

United States
Circuit Court of Appeals
For the Ninth Circuit. ⁴

HENRY ALBERS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Oregon.

FILED
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F. D. MORGENTHAU,
CLERK

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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*United States Circuit Court of Appeals for the Ninth
Circuit.*

HENRY ALBERS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Names and Addresses of the Attorneys of Record.

Mr. HENRY E. MCGINN and Mr. R. CITRON,
Oregonian Building, Portland Oregon, and
VEAZIE, McCOURT and VEAZIE, Corbett
Building, Portland Oregon,

For the Plaintiff in Error.

Mr. BERT E. HANEY, United States Attorney, and
Mr. BARNETT H. GOLDSTEIN, Assistant
United States Attorney, Old Post Office Build-
ing, Portland, Oregon,

For the Defendant in Error.

Citation on Writ of Error.

United States of America,
District of Oregon,—ss.

To United States of America GREETING:

You are hereby cited and admonished to be and ap-
pear before the United States Circuit Court of Ap-
peals for the Ninth Circuit, at San Francisco,
California, within thirty days from the date hereof,
pursuant to a writ of error filed in the clerk's office
of the District Court of the United States for the

District of Oregon, wherein Henry Albers is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 22d day of May, in the year of our Lord, one thousand nine hundred and nineteen.

CHAS. E. WOLVERTON,
Judge. [1*]

Due service of within citation hereby acknowledged this 22d day of May, 1919.

BARNETT H. GOLDSTEIN,
Asst. U. S. Atty.

[Endorsed]: No. 8159. United States District Court, District of Oregon. United States of America vs. Henry Albers. Citation on Writ of Error. Filed in the U. S. District Court, District of Oregon. Filed May 22, 1919. By G. H. Marsh, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

HENRY ALBERS,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

*Page number appearing at foot of page of original certified Transcript of Record.

Writ of Error.

The United States of America,—ss.

The President of the United States of America, to the
Judge of the District Court of the United States
for the District of Oregon, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Charles E. Wolverton, one of you, between United States of America, plaintiff and defendant in error, and Henry Albers, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this 22 day of May, 1919.

[Seal] G. H. MARSH,
Clerk of the District Court of the United States for
the District of Oregon.

By F. S. BUCK,
Deputy. [2]

Service of the foregoing Writ of Error made this 22d day of May, 1919, upon the District Court of the United States for the District of Oregon, by filing with me, as clerk of said court, a duly certified copy of said writ of error.

G. H. MARSH,
Clerk of the District Court of the United States for
the District of Oregon.

By F. S. BUCK,
Deputy.

[Endorsed]: No. 8159. In the U. S. Circuit Court of Appeals for the Ninth Circuit. Henry Albers, Plaintiff in Error, vs. United States of America, Defendant in Error. Writ of Error. Filed May 22, 1919. G. H. Marsh, Clerk, United States District Court, District of Oregon. By F. S. Buck, Deputy Clerk.

*In the District Court of the United States for the
District of Oregon.*

JULY TERM, 1918.

BE IT REMEMBERED, That on the 2d day of November, 1918, there was duly filed in the District

Court of the United States for the District of Oregon
an indictment, in words and figures as follows, to wit:
[3]

*In the District Court of the United States for the Dis-
trict of Oregon.*

UNITED STATES OF AMERICA

vs.

HENRY ALBERS,

Defendant.

**Indictment for Violation of Section 3, Title 1 of the
Espionage Act and as Amended by the Act of
Congress Approved May 16, 1918.**

United States of America,
District of Oregon,—ss.

The Grand Jurors of the United States of
America for the District of Oregon, duly impaneled,
sworn and charged to inquire within and for said dis-
trict, upon their oaths and affirmations do find,
charge, allege and present:

COUNT ONE.

That during all of the time between the 6th day of
April, 1917, and the date of the finding of this indict-
ment, the United States then was and is now at war
with the Imperial German Government, said state of
war having been on said 6th day of April, 1917, duly
declared by the Congress and duly proclaimed by the
President of the United States of America in the
exercise of the authority in them vested as by law
provided.

That Henry Albers, the above-named defendant, on, to wit, the 8th day of October, 1918, in the State and District of Oregon, and within the jurisdiction of this Court, and more particularly while traveling as a passenger upon a Southern Pacific Railroad train en route to Portland, in the State of Oregon, and passing at a point between Grants Pass and Roseburg, in said State and District of Oregon, then and there being, did wilfully, knowingly, unlawfully and feloniously cause, and [4] attempt to cause, incite, and attempt to incite, insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States, to wit, men of registration age and subject to and eligible for draft and conscription, under the provisions of the Act of Congress approved May 18, 1917, known as the "Selective Service Law" and the amendment thereto approved August 31, 1918, by then and there stating, declaring, debating and agitating to, and in the presence of such men, and in particular L. W. Kinney, L. E. Gamaunt, J. A. Mead, E. C. Bendixen, F. B. Tichenor, and others to the Grand Jurors unknown, the said named persons then and there being of registration age and subject to draft and conscription, as aforesaid, in substance and to the effect as follows, to wit:

1. I am a German and don't deny it—once a German, always a German."

2. "I served twenty-five years under the Kaiser [meaning William II, German Emperor] and I would go back to Germany tomorrow."

3. "I came here [meaning the United

States] without anything and I could go away without anything.”

4. “I came to this country [meaning the United States] supposing it was a free country but I find that it is not as free as Germany.”

5. “McAdoo [meaning W. G. McAdoo, then and there Secretary of the Treasury of the United States] is a son-of-a-bitch. Why should this Government tell me what to do?”

6. “I am a pro-German; so are my brothers.”

7. “A German can never be beaten by a Yank [meaning an American].”

8. “You [meaning the United States] can never lick the Kaiser [meaning William II., German Emperor]—never in a thousand years.”

9. “There will be a revolution in this country [meaning the United States] in ten years—yes, in two—maybe tomorrow.”

10. “I could take a gun myself and fight right here [meaning in the United States].” [5]

11. “To hell with America.”

12. “I have helped Germany in this war, and I would give every cent I have to defeat the United States.”

13. “We [meaning Germany] have won the war.”

and other statements of a like nature but expressed in language too filthy, vulgar and indecent to be spread upon the records of this Honorable Court, all of which said statements, so made by the said defendant as aforesaid, were then and there wilfully made by him, the said defendant, with the intent then and

there on the part of him, the said defendant, to cause, and attempt to cause, incite, and attempt to incite, insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States, at a time when the United States was then and there in a state of war with the Imperial German Government, as he, the said defendant, then and there well knew; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

COUNT TWO.

That during all of the time between the 6th day of April, 1917, and the date of the finding of this indictment, the United States then was and is now at war with the Imperial German Government, said state of war having been on said 6th day of April, 1917, duly declared by the Congress and duly proclaimed by the President of the United States of America in the exercise of the authority in them vested as by law provided.

That Henry Albers, the above-named defendant, on, to wit, [6] the 8th day of October, 1918, in the State and District of Oregon, and within the jurisdiction of this court, and more particularly while traveling as a passenger upon a Southern Pacific Railroad train en route to Portland, in the State of Oregon, and passing at a point between Grants Pass and Roseburg, in said State and District of Oregon, then and there being, did wilfully,

knowingly, unlawfully and feloniously obstruct, and attempt to obstruct, the recruiting and enlistment service of the United States, by then and there stating, declaring, debating and agitating to, and in the presence of L. W. Kinney, L. E. Gamaunt, J. A. Mead, E. C. Bendixen, F. B. Tichenor, and others to the Grand Jurors unknown, the said named persons then and there being eligible and qualified to enlist in the service of the United States, in substance and to the effect following, to wit:

1. "I am a German and don't deny it—once a German, always a German."

2. "I served twenty-five years under the Kaiser [meaning William II, German Emperor] and I would go back to Germany tomorrow."

3. "I came here [meaning the United States] without anything and I could go away without anything."

4. "I came to this country [meaning the United States] supposing it was a free country but I find that it is not as free as Germany."

5. "McAdoo [meaning W. G. McAdoo, then and there Secretary of the Treasury of the United States] is a son-of-a-bitch. Why should this Government tell me what to do?"

6. "I am a pro-German; so are my brothers."

7. "A German can never be beaten by a Yank [meaning an American]."

8. "You [meaning the United States] can never lick the Kaiser [meaning William II., German Emperor]—never in a thousand years."

9. "There will be a revolution in this country [meaning the United States] in ten years—yes, in two—maybe tomorrow." [7]

10. "I could take a gun myself and fight right here [meaning in the United States]."

11. "To hell with America."

12. "I have helped Germany in this war, and I would give every cent I have to defeat the United States."

13. "We [meaning Germany] have won the war."

and other statements of a like nature, but expressed in language too vulgar, filthy and indecent to be spread upon the records of this Honorable Court; all of which said statements, so made by the said defendant, as aforesaid, were then and there wilfully made by the said defendant with the intent, then and there, on the part of him, the said defendant, to obstruct, and attempt to obstruct, the recruiting and enlistment service of the United States, at a time when the United States was then and there in a state of war with the Imperial German Government, as aforesaid, as he, the said defendant, then and there well knew; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

COUNT THREE.

That during all of the time between the 6th day of April, 1917, and the date of the finding of this in-

dictment, the United States then was and now is at war with the Imperial German Government, said state of war having been on said 6th day of April, 1917, duly declared by the Congress and duly proclaimed by the President of the United States of America in the exercise of the authority in them vested as by law provided.

That Henry Albers, the above-named defendant, on to wit, [8] the 8th of October, 1918, in the State and District of Oregon, and within the jurisdiction of this court, and more particularly while traveling as a passenger upon a Southern Pacific Railroad train en route to Portland, in the State of Oregon, and passing at a point between Grants Pass and Roseburg, in said State and District of Oregon, then and there being, did wilfully, knowingly, unlawfully and feloniously utter language intended to incite, provoke and encourage resistance to the United States, and to promote the cause of its enemies, by then and there stating and declaring to, and in the presence of L. W. Kinney, L. E. Gamaunt, J. A. Mead, E. C. Bendixen, F. B. Tichenor, and others to the Grand Jurors unknown, among other things, in substance and to the effect as follows, to wit:

1. "I am a German and don't deny it—once a German, always a German."
2. "I served twenty-five years under the Kaiser [meaning William II, German Emperor] and I would go back to Germany tomorrow."
3. "I came here [meaning the United States]

without anything and I could go away without anything.”

4. “I came to this country [meaning the United States] supposing it was a free country but I find that it is not as free as Germany.”

5. “McAdoo [meaning W. G. McAdoo, then and there Secretary of the Treasury of the United States] is a son-of-a-bitch. Why should this Government tell me what to do?”

6. “I am a pro-German; so are my brothers.”

7. “A German can never be beaten by a Yank [meaning an American].

8. “You [meaning the United States] can never lick the Kaiser [meaning William II, German Emperor]—never in a thousand years.”

9. “There will be a revolution in this country [meaning the United States] in ten years—yes, in two—maybe tomorrow.” [9]

10. “I could take a gun myself and fight right here [meaning in the United States].”

11. “To hell with America.”

12. “I have helped Germany in this war, and I would give every cent I have to defeat the United States.”

13. “We [meaning Germany] have won the war.”

and other statements of a like nature, but expressed in language too vulgar, filthy and indecent to be spread upon the records of this Honorable Court; all of which statements so made by the defendant, as aforesaid, were then and there wilfully made by the said defendant, as aforesaid, with the intent, then and

there, on the part of him the said defendant, to incite, provoke and encourage resistance to the United States, and to promote the cause of its enemies, at a time when the United States was then and there in a state of war with the Imperial German Government, as aforesaid, as he, the said defendant, then and there well knew; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege, and present:

COUNT FOUR.

That during all of the time between the 6th day of April, 1917, and the date of the finding of this indictment, the United States then was and is now at war with the Imperial German Government, said state of war having been on said 6th day of April, 1917, duly declared by the Congress and duly proclaimed by the President of the United States of America in the exercise of the authority in them vested as by law provided. [10]

That Henry Albers, the above-named defendant, on, to wit, the 8th day of October, 1918, in the State and District of Oregon, and within the jurisdiction of this court, and more particularly while travelling as a passenger upon a Southern Pacific Railroad train en route to Portland, in the State of Oregon, and passing at a point between Grants Pass and Roseburg, in said State and District of Oregon, then and there being, did wilfully, knowingly, unlawfully and feloniously support and favor the cause of a country

with which the United States was then and there at war, to wit, the Imperial German Government, and oppose the cause of the United States therein, by then and there stating to and in the presence of L. W. Kinney, L. E. Gamaunt, J. A. Mead, E. C. Bendixen, F. B. Tichenor, and others to the Grand Jurors unknown, among other things, in substance and to the effect as follows, to wit:

1. "I am a German and don't deny it—once a German, always a German."

2. "I served twenty-five years under the Kaiser [meaning William II, German Emperor], and I would go back tomorrow."

3. "I came here [meaning the United States], without anything and I could go away without anything."

4. "I came to this country [meaning the United States] supposing it was a free country but I find that it is not as free as Germany."

5. "McAdoo [meaning W. G. McAdoo, then and there Secretary of the Treasury of the United States] is a son-of-a-bitch. Why should this Government tell me what to do?"

6. "I am a pro-German; so are my brothers."

7. "A German can never be beaten by a Yank [meaning an American]."

8. "You [meaning the United States] can never lick the Kaiser [meaning William II, German Emperor]—never in a thousand years."

9. "There will be a revolution in this country [11] [meaning the United States], in ten years—yes, in two—maybe tomorrow."

10. "I could take a gun myself and fight right here [meaning the United States]."

11. "To hell with America."

12. I have helped Germany in this war, and I would give every cent I have to defeat the United States."

13. "We [meaning Germany] have won the war."

and other statements of a like nature, but expressed in language too vulgar, filthy and indecent to be spread upon the records of this Honorable Court.

And so, the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do find, charge, allege and present, *tht* said defendant, Henry Albers, at the time and place aforesaid, and in the manner aforesaid, did, by word, support and favor the cause of a country with which the United States was then and is now at war, to wit, the Imperial German Government, and oppose the cause of the United States therein; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

COUNT FIVE.

That during all of the time between the 6th day of April, 1917, and the date of the finding of this indictment, the United States was then and is now at war with the Imperial German Government, said state of war having been on said 6th day of April, 1917, duly

declared by the Congress and duly proclaimed by the President of the United States of America in the exercise of the authority in them vested as by law provided. [12]

That Henry Albers, the above-named defendant, on, to wit, between the 1st day of July, 1917, and the 1st day of May, 1918, the exact date and dates thereof being to the Grand Jurors unknown, at the city of Portland, in the State and district of Oregon, and within the jurisdiction of this court, then and there being, did knowingly, unlawfully, wilfully and feloniously make and convey false reports and false statements with intent to interfere with the operation and success of the military and naval forces of the United States and to promote the success of its enemies, by stating and declaring to, and in the presence of, one N. F. Titus, and to others to the Grand Jurors unknown, among other things, in substance and to the effect as follows, *as follows*, to wit:

1. That all reports of the German atrocities (meaning thereby the reports of atrocities then being and having theretofore been committed by Germany, in Belgium, France and on the high seas by its military and naval forces, while Germany was then at war with the United States) were lies and nothing but lies;

2. That the United States and the citizens thereof are dominated by the English press;

3. That the United States Food Administration was organized and managed improperly, was wrong, outrageous, and no good;

4. That the United States had no cause to attack Germany;

all of which said reports and statements were false and untrue as he, the said defendant, then and there well knew, and all of which said false reports and false statements were so then and there wilfully made by the said defendant with the intent and purpose on the part of him, the said defendant, to interfere with the operation and success of the military and naval forces of the United States, and to promote the success of its enemies, at a time when the United States was then and there in a state of [13] war with the Imperial German Government, as he, the said defendant, then and there well knew; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

COUNT SIX.

That during all of the time between the 6th day of April, 1917, and the date of the finding of this indictment, the United States then was and is now at war with the Imperial Government, said state of war having been on said 6th day of April, 1917, duly declared by the Congress and duly proclaimed by the President of the United States of America in the exercise of the authority in them vested as by law provided.

That Henry Albers, the defendant above named, on, to wit, between the 1st day of July, 1917, and the

1st day of May, 1918, the exact date and dates thereof being to the Grand Jurors unknown, at the city of Portland, in the State and District of Oregon, and within the jurisdiction of this Court, then and there being, did knowingly, unlawfully, wilfully and feloniously cause, and attempt to cause, insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States, to the injury of the service and of the United States, by stating, declaring, debating and agitating to, and in the presence of, one N. F. Titus, and to others to the Grand Jurors unknown, among other things, in substance and to the effect as follows, to wit: [14]

1. That all reports of the German atrocities (meaning thereby the reports of the atrocities then being, and having theretofore been, committed by Germany, in Belgium, France and on the high seas by its military and naval forces, while Germany was then at war with the United States) were lies and nothing but lies;

2. That the United States and the citizens thereof are dominated by the English press;

3. That the United States Food Administration was organized and managed improperly; was wrong, outrageous, and no good;

4. That the United States had no cause to attack Germany;

5. That this country (meaning thereby the United States) could never lick the Kaiser (meaning thereby William II, German Emperor) in a thousand years;

6. That all the institutions of the United

States (meaning thereby the Government of the United States) were inferior to the institutions of Germany (meaning thereby the Government of Germany);

7. That the United States was up against a hard proposition when it attacked Germany (meaning thereby that the United States would be unable to defeat Germany in the present war); that the American soldiers were mere amateurs while the German soldiers were professionals;

8. That he (meaning thereby the said defendant) did not like the institutions of this country; that Germany was a better country to live in, and was a country where people enjoyed life;

9. That he (meaning thereby the said defendant) had lived in Germany twenty-five years, and that he preferred that country to this (meaning the United States);

10. That there was going to be a revolution in the United States; that the people of this country (meaning the United States) were living on a volcano; that something was liable to happen at any time and that the people of this country had better look out;

all of which said statements so made by the said defendant as aforesaid were then and there wilfully made by him, the said defendant, with the intent and purpose then and there on the part of him, the said defendant, to cause, and attempt to cause, insubordination, disloyalty, mutiny and refusal of duty

in the [15] military and naval forces of the United States to the injury of the service and of the United States; he, the said N. F. Titus, then and there being a male person subject to and eligible for service in the military and naval forces of the United States, at a time when the United States was then and there in a state of war with the Imperial German Government, as he, the said defendant, then and there well knew; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

COUNT SEVEN.

That during all of the time between the 6th day of April, 1917, and the date of the finding of this indictment, the United States then was and is now at war with the Imperial German Government, said state of war having been on said 6th day of April, 1917, duly declared by the Congress and duly proclaimed by the President of the United States of America in the exercise of the authority in them vested as by law provided.

That Henry Albers, the above-named defendant, on, to wit, between the 1st day of July, 1917, and the 1st day of May, 1918, the exact date and dates thereof being to the Grand Jurors unknown, at the city of Portland, in the State and District of Oregon, and within the jurisdiction of this Court, then and there being, did knowingly, unlawfully, wilfully and feloniously obstruct, the recruiting and enlistment service

of the United States, to the injury of the service and of the United States, by then and there stating, declaring, debating and agitating to [16] and in the presence of, one N. F. Titus, and to others to the Grand Jurors unknown, among other things, in substance and to the effect as follows, to wit:

1. That all reports of the German atrocities (meaning thereby the reports of the atrocities then being, and having theretofore been, committed by Germany, in Belgium, France and on the high seas by its military and naval forces, while Germany was then at war with the United States) were lies and nothing but lies.

2. That the United States and the citizens thereof are dominated by the English press;

3. That the United States Food Administration was organized and managed improperly; was wrong, outrageous, and no good;

4. That the United States had no cause to attack Germany;

5. That this country (meaning thereby the United States) could never lick the Kaiser (meaning thereby William II, German Emperor) in a thousand years;

6. That all the institutions of the United States (meaning thereby the Government of the United States) were inferior to the institutions of Germany (meaning thereby the Government of Germany);

7. That the United States was up against a hard proposition when it attacked Germany (meaning thereby that the United States would

be unable to defeat Germany in the present war); that the American soldiers were mere amateurs while the German soldiers were professionals;

8. That he (meaning thereby the said defendant) did not like the institutions of this country; that Germany was a better country to live in, and was a country where people enjoyed life;

9. That he (meaning thereby the said defendant) had lived in Germany twenty-five years, and that he preferred that country to this (meaning the United States);

10. That there was going to be a revolution in the United States; that the people of this country (meaning the United States) were living on a volcano; that something was liable to happen a any time and that the people of this country had better look out;

all of which said statements so made by said defendant, as aforesaid, were then and there wilfully made by him, the said defendant, with the intent and purpose then and there on the part of [17] him, the said defendant, to obstruct the recruiting and enlistment service of the United States, to the injury of the service and of the United States; he, the said N. F. Titus, then and there being a male person eligible for enlistment service in the United States military and naval forces, at a time when the United States was then and there at war with the Imperial German Government, as he, the said defendant, then and there well knew; contrary to the form of the

statute in such case made and provided and against the peace and dignity of the United States of America.

Dated at Portland, Oregon, this 2d day of Nov., 1918.

(Signed) B. E. HANEY,
United States Attorney.

A true bill.

(Signed) CARL H. JACKSON,
Foreman United States Grand Jury.

[Endorsed]: A True Bill. Carl H. Jackson, Foreman Grand Jury. B. E. Haney, U. S. Attorney. Filed in open court. Nov. 2, 1918. G. H. Marsh, Clerk. K. F. Frazer, Deputy. [18]

AND AFTERWARDS, to wit, on Friday, the 22d day of November, 1918, the same being the 17th judicial day of the regular November term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [19]

In the District Court of the United States for the District of Oregon.

No. 8159.

November 22, 1918.

THE UNITED STATES OF AMERICA

vs.

HENRY ALBERS.

Arraignment.

INDICTMENT: ESPIONAGE ACT.

Now, at this day, come the plaintiff by Mr. Barnett

H. Goldstein, Assistant United States Attorney, and the defendant above named in his own proper person and by Mr. Henry E. McGinn, of counsel. Whereupon said defendant is duly arraigned upon the indictment herein. [20]

AND AFTERWARDS, to wit, on the 15th day of January, 1919, there was duly filed in said court a demurrer to indictment, in words and figures as follows, to wit: [21]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY ALBERS,

Defendant.

Demurrer to Indictment.

Comes now the defendant, Henry Albers, and demurs to the indictment herein filed against him as follows:

FIRST. Defendant demurs to Count One of said indictment for the following reasons: (1) That said indictment does not state facts sufficient to constitute a crime against the laws of the United States and does not state facts sufficient to charge a crime against this defendant. (2) That section III of the Act of Congress, approved June 15, 1917, commonly known as the Espionage Act, as amended by Act of Congress, May 16, 1918, upon which said

Count One of said indictment is based, is in conflict with and violates Article I of the Amendments to the Constitution of the United States.

SECOND. Defendant demurs to Count Two of said indictment for the following reasons: (1) That said Count Two of said indictment does not state facts sufficient to constitute a crime against the laws of the United States and does not state facts sufficient to charge a crime against the defendant. (2) That the Act of Congress, approved June 15, 1917, commonly known as the Espionage Act, and particularly Section III thereof, as amended by Act of Congress May 16, 1918, upon which said Count Two of said indictment is based, is in direct conflict [22] with and violates Article I of the Amendments to the Constitution of the United States.

THIRD. Defendant demurs to Count Three of said indictment, for the following reasons: (1) That said Count Three of said indictment does not state facts sufficient to constitute a crime against the laws of the United States, or to charge a crime against this defendant. (2) That said Count Three of said indictment is duplicitous in this: that it is attempted therein to charge two crimes against the defendant, to wit: The crime of uttering language intended to incite, provoke and encourage resistance to the United States and also the crime of uttering language intended to promote the cause of the enemies of the United States; the two offences mentioned being separate and distinct offences denounced by said statute, upon which said indictment is apparently based. (3) That the Act of Congress, approved

June 15, 1917, commonly known as the Espionage Act, and particularly section III thereof, as amended by the Act of May 16, 1918, is in conflict with and violates Article I of the Amendments to the Constitution of the United States.

FOURTH. Defendant demurs to Count Four of said indictment, for the following reasons: (1) That said Count Four of said indictment does not state facts sufficient to constitute a crime against the laws of the United States and does not state facts sufficient to charge a crime against the defendant. (2) That said Count Four of said indictment attempts to charge two separate and distinct offences; it charges that the defendant did wilfully, etc., support and favor the cause of the country with which the United States was then and there at war, which is a complete offence under the statutes. Count Four also charges that the defendant did wilfully, etc., oppose the cause [23] of the United States in said war, which is also a complete offence under the statutes. Said count of said indictment is therefore duplicitous. (3) That the Act of Congress, approved June 15, 1917, commonly known as the Espionage Act, and particularly section III thereof, as amended by the Act of May 16, 1918, is in conflict with and violates Article I, of the amendment to the Constitution of the United States.

FIFTH. Defendant demurs to Counts Five, Six, and Seven of said indictment for the following reasons:

(1) That neither of said last-mentioned counts state facts sufficient to constitute a crime against the

laws of the United States, or to charge a crime against the defendant.

(2) That the Act of Congress of May 16, 1918, amending section 3 of the Espionage Act had the effect of repealing section 3 of said Act as the same existed in the original Act. Each of said Counts Five, Six and Seven of the indictment attempt to charge a crime as denounced by section 3 of the Act of June 15, 1917 (Espionage Act), which Act had ceased to exist at the time said indictment was returned and found.

(3) That the Act of Congress approved June 15, 1917, commonly known as the Espionage Act, upon which each of said Counts Five, Six and Seven of said indictment purport to be based, is in conflict with and violates Article I of the amendments to the Constitution of the United States, as likewise does section 3 of said Act as amended by the Act of May 16, 1918.

(Signed) HENRY E. MCGINN,
JOHN McCOURT,
R. CITRON,

Attorneys for Defendant. [24]

United States of America,
District of Oregon,—ss.

I, John McCourt, hereby certify that I am one of defendant's attorneys; that I have carefully examined the indictment to which the foregoing demurrer is directed, and I believe that the demurrer is well founded, and that the same is not made for purposes of delay.

(Signed) JOHN McCOURT.

District of Oregon,
County of Multnomah,—ss.

Due, timely and legal service by copy, admitted at
Portland, Oregon, this 14th day of January, 1919.

Attorney for Plaintiff.

Filed January 15, 1919. G. H. Marsh, Clerk. By
K. F. Frazer, Deputy. [25]

AND AFTERWARDS, to wit, on Thursday, the 16th
day of January, 1919, the same being the 62d
judicial day of the regular November term of
said Court—Present, the Honorable CHARLES
E. WOLVERTON, United States District
Judge, presiding—the following proceedings
were had in said cause, to wit: [26]

*In the District Court of the United States for the
District of Oregon.*

No. 8159.

January 16, 1919.

THE UNITED STATES OF AMERICA

vs.

HENRY ALBERS.

Order Overruling Demurrer, etc.

INDICTMENT:

Section 3, Title 1, Espionage Act.

Now, at this day, come the plaintiff by Mr. Barnett
H. Goldstein, Assistant United States Attorney, and

the defendant in his own proper person and by Mr. John McCourt, of counsel. Where upon this cause comes on to be heard by the Court upon the demurrer of the defendant to the indictment herein, and the Court now being fully advised in the premises—

IT IS ORDERED that said demurrer be and the same is hereby overruled, whereupon upon motion of said defendant for postponement of the trial of this cause

IT IS ORDERED that said motion be and the same is hereby denied. Whereupon said defendant for plea to the indictment herein says he is not guilty as charged in said indictment. [27]

AND AFTERWARDS, to wit, on Tuesday, the 28th day of January, 1919, the same being the 72d judicial day of the regular November term of said Court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [28]

In the District Court of the United States for the District of Oregon.

No. 8159.

January 28, 1919.

THE UNITED STATES OF AMERICA

vs.

HENRY ALBERS.

Trial.

INDICTMENT:

Section 3, Title 1, Act of May 16, 1918.

Now, at this day, come the plaintiff by Mr. Bert E. Haney, United States Attorney, and Mr. Barnett H. Goldstein, Assistant United States Attorney, and the defendant in his own proper person and by his counsel as of yesterday, whereupon the Court proceeds to select the jury. And thereupon now come the following named jurors to try the issues joined, viz: J. J. Van Kleek, T. J. Elliott, Arthur E. Hastings, Benjamin F. Holman, Frank W. Bartholomew, John Frye, George P. Litchfield, Harry Ball, Walter A. Durham, George Thyng, Carl Fisher and William Larsen, twelve good and lawful men of the district, who, being accepted by both parties, are duly impaneled and sworn. And the hour of adjournment having arrived, the further trial of this cause is continued to to-morrow, Wednesday, January 29, 1919.
[29]

AND AFTERWARDS, to wit, on the 1st day of February, 1919, there was duly filed in said court a motion of defendant for directed verdict, in words and figures as follows, to wit: [30]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA

vs.

HENRY ALBERS,

Defendant.

Motion for Directed Verdict.

Defendant moves and requests this Honorable Court to direct and instruct the jury to find and return a verdict herein of not guilty on Count 1 of the indictment.

Defendant moves and requests this Honorable Court to direct and instruct the jury to find and return a verdict herein of not guilty on Count 1 of the indictment.

Defendant moves and requests this Honorable Court to direct and instruct the jury to find and return a verdict herein of not guilty on Count 3 of the indictment.

Defendant moves and requests this Honorable Court to direct and instruct the jury to find and return a verdict herein of not guilty on Count 4 of the indictment.

Defendant moves and requests this Honorable Court to direct and instruct the jury to find and return a verdict herein of not guilty on Count 5 of the indictment.

Defendant moves and requests this Honorable Court to direct and instruct the jury to find and return a verdict herein of not guilty on Count 6 of the indictment.

Defendant moves and requests this Honorable Court to direct and instruct the jury to find and re-

turn a verdict herein of not guilty on Count 7 of the indictment.

(Signed) HENRY E. McGINN,
RALPH CITRON,
JOHN McCOURT,
Attorneys for Defendant.

Filed Feb. 1, 1919. G. H. Marsh, Clerk. By K. F. Frazer, Deputy. [31]

AND AFTERWARDS, to wit, on Saturday, the 1st day of February, 1919, the same being the 76th judicial day of the regular November term of said Court—Present the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [32]

In the District Court of the United States for the District of Oregon.

No. 8159.

February 1, 1919.

THE UNITED STATES OF AMERICA

vs.

HENRY ALBERS.

**Order Denying Motion for Directed Verdict.
INDICTMENT:**

Section 3, Title 1, Espionage Act as Amended by Act of May 16, 1918.

Now, at this day, come the plaintiff by Mr. Bert E. Haney, United States Attorney, and Mr. Barnett

H. Goldstein, Assistant United States Attorney, and the defendant in his own proper person and by his counsel as of yesterday. Whereupon the jury impaneled herein being present and answering to their names, the trial of this cause is resumed. And thereupon the defendant above named moves the Court for a directed verdict of not guilty in his own behalf upon each and every count of the indictment herein. Upon consideration whereof

IT IS ORDERED that said motion be and the same is hereby denied. And the said jury having heard the evidence adduced, and the hour of adjournment having arrived, the further trial of this cause is continued to Monday, February 3, 1919, at two o'clock P. M. [33]

AND AFTERWARDS, to wit, on Wednesday, the 5th day of February, 1919, the same being the 79th judicial day of the regular November term of said Court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [34]

In the District Court of the United States for the District of Oregon.

No. 8159.

February 5, 1919.

THE UNITED STATES OF AMERICA

vs.

HENRY ALBERS.

Trial (Continued).**INDICTMENT:**

Section 3, Title 1, Espionage Act, as Amended.

Now, at this day, come the plaintiff by Mr. Bert E. Haney, United States Attorney, and Mr. Barnett H. Goldstein, Assistant United States Attorney, and the defendant above named in his own proper person and by Mr. John McCourt and Mr. Raphael Citron, of counsel. Whereupon the jury impaneled herein come into court, answer to their names and return to the Court the following verdict, viz:

“We, the Jury duly impaneled to try the above-entitled cause, do find the defendant, Henry Albers, not guilty as charged in Count One of the Indictment and not guilty as charged in Count Two of the Indictment, and guilty as charged in Count Three of the Indictment, and guilty as charged in Count Four of the Indictment, and not guilty as charged in Count Five of the Indictment, and not guilty as charged in Count Six of the Indictment, and not guilty as charged in Count Seven of the Indictment herein.

Dated at Portland, Oregon, this 4 day of February, 1919.

B. F. HOLMAN,
Foreman.”

Whereupon, upon motion of said defendant, IT IS ORDERED that the said jury be polled, and thereupon each of said jurors in answer to his name for himself says that the said verdict is his verdict. And thereupon said verdict is received by the Court

and ordered to be filed. Whereupon upon [35] motion of said defendant,

IT IS ORDERED that he be and he is hereby allowed thirty days from this date within which to file a motion to set aside the verdict herein, and for a new trial and a motion in arrest of judgment, and ninety days from this date to prepare and submit his bill of exceptions, and

IT IS FURTHER ORDERED that the bail of said defendant heretofore given stand as the bail of said defendant until the further order of the Court. [36]

AND AFTERWARDS, to wit, on the 5th day of February, 1919, there was duly filed in said court a verdict, in words and figures as follows, to wit: [37]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA

vs.

HENRY ALBERS,

Defendant.

Verdict.

We, the jury impaneled to try the above-entitled cause, do find the defendant, Henry Albers, not guilty as charged in Count One of the Indictment, and not guilty as charged in Count Two of the Indictment, and guilty as charged in Count Three of the Indictment, and guilty as charged in Count Four

of the Indictment, and not guilty as charged in Count Five of the Indictment, and not guilty as charged in Count Six of the Indictment, and not guilty as charged in Count Seven of the Indictment herein.

Dated at Portland, Oregon, this 4 day of February, 1919.

(Signed) B. F. HOLMAN,
Foreman.

Filed Feb. 5, 1919. G. H. Marsh, Clerk. By
K. F. Frazer, Deputy. [38]

AND AFTERWARDS, to wit, on the 17th day of March, 1919, there was duly filed in said court a motion in arrest of judgment, in words and figures as follows, to wit: [39]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA

vs.

HENRY ALBERS,

Defendant.

Motion in Arrest of Judgment.

Comes now the defendant and moves this Honorable Court for an order herein arresting judgment upon the verdict returned by the jury in the above-entitled cause upon Count 3 of the indictment and for an order arresting judgment upon Count 4 of the indictment, for the following reasons:

I.

That said Count 3 of the indictment does not state

a crime against the defendant.

II.

That said Count 3 of the indictment is duplicitous in that two offenses are attempted to be stated therein.

III.

That the evidence offered by the Government to prove the charges set forth in Count 3 of the indictment was wholly insufficient to prove the crime charged therein.

IV.

That said Count 4 of the indictment does not state a crime against the defendant.

V.

That said Count 4 of the indictment is duplicitous in that two offenses are attempted to be stated therein.

VI.

That the evidence offered by the Government to prove the charges set forth in Count 4 of the indictment was wholly [40] insufficient to prove the crime charged therein.

(Signed) HENRY E. MCGINN,
RALPH CITRON,
JOHN McCOURT,
Attorneys for Defendant.

Due service of the foregoing motion is hereby admitted in Multnomah County, Oregon, this 17th day of March, 1919, by receiving a copy thereof, duly certified to as such by John McCourt, one of the attorneys for defendant.

(Signed) B. E. HANEY,
Attorney for Plaintiff.

Filed March 17, 1919. G. H. Marsh, Clerk. By K. F. Frazer, Deputy. [41]

AND AFTERWARDS, to wit, on Monday, the 17th day of March, 1919, the same being the 13th judicial day of the regular March term of said Court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [42]

In the District Court of the United States for the District of Oregon.

No. 8159.

March 17, 1919.

THE UNITED STATES OF AMERICA

vs.

HENRY ALBERS.

Sentence.

INDICTMENT: ESPIONAGE ACT.

Now, at this day, this cause comes on to be heard upon the motion of the defendant to set aside the verdict and for a new trial herein, said plaintiff appearing by Mr. Bert E. Haney, United States Attorney, and Mr. Barnett H. Goldstein, Assistant United States Attorney, and the defendant in his own proper person and by Mr. Henry E. McGinn and Mr. John McCourt, of counsel. Upon consideration whereof

IT IS ORDERED that said motion be and the same is hereby overruled.

Whereupon said defendant files a motion in arrest of judgment. And upon consideration thereof it is ORDERED that said motion be and the same is hereby denied. Whereupon, upon motion of said plaintiff for judgment upon the verdict herein

IT IS ADJUDGED that said defendant do pay a fine of \$10,000.00, and that he be imprisoned in the United States Penitentiary at McNeil Island, Washington, for the term of three years, and that he stand committed until this sentence be performed or until he be discharged according to law. Whereupon, upon motion of said defendant, it is ORDERED that he be and he is hereby allowed ninety days from February 5, 1919, within which to prepare and submit his bill of exceptions herein, and it is ORDERED that execution of this sentence be stayed until that date. [43]

AND AFTERWARDS, to wit, on the 22d day of May, 1919, there was duly filed in said court, a petition for writ of error, in words and figures as follows, to wit: [44]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA.

vs.

HENRY ALBERS,

Defendant.

Petition for Writ of Error.

Your petitioner, Henry Albers, defendant in the

above-entitled cause, now comes and brings this, his petition as plaintiff in error, for a writ of error to the District Court of the United States for the District of Oregon, and thereupon your petitioner shows:

That on the 17th day of March, 1919, there was rendered and entered in the above-entitled cause a judgment in and by said District Court of the United States for the District of Oregon, wherein and whereby your petitioner was sentenced and adjudged to be imprisoned in the United States Penitentiary at McNeil's Island for a period of three (3) years and to pay a fine of Ten Thousand (\$10,000.00) Dollars.

And your petitioner further shows that he is advised by counsel that there are manifest errors in the records and proceedings at and in said cause in the rendition of said judgment and sentence, to the great damage of your petitioner, all of which errors will be made to appear by examination of the said record and more particularly be an examination of the bill of exceptions by your petitioner tendered and filed herein and in the assignments of error filed and tendered herewith.

To the end, therefore, that the said judgment, sentence and proceedings may be reversed by the United States [45] Circuit Court of Appeals of the Ninth Circuit, your petitioner prays that a writ of error may be issued, directed therefrom to the said District Court of the United States for the District of Oregon, returnable according to law, and the practice of this Court, and that there may be directed to be returned pursuant thereto a true copy of the record,

bill of exceptions, assignments of error and all proceedings had in said cause; that the same may be removed into the United States Circuit Court of Appeals for the Ninth Circuit to the end that the errors, if any have happened, may be fully corrected, and full and speedy justice done your petitioner.

And your petitioner now makes his assignments of error filed herewith upon which he will rely, and which will be made to appear by the return of said record in obedience to said writ.

WHEREFORE, your petitioner prays the issuance of a writ as hereinbefore prayed for, and prays that his assignments of error filed herewith may be considered as his assignments of error upon the writ, and that the judgment rendered in this cause may be reversed and held for naught and said cause remanded for further proceedings, and also that an order be made fixing the amount of security which the said petitioner shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court against the said petitioner be suspended and stayed until the determination of the said writ of error in the said Circuit Court of Appeals.

(Signed) HENRY E. MCGINN,
VEAZIE, McCOURT & VEAZIE,
Attorneys for Petitioner. [46]

State of Oregon,
County of Multnomah,—ss.

Due service of the within Petition for Writ of Error is hereby accepted in Multnomah County, Oregon, this 22d day of May, 1919, by receiving a copy

thereof duly certified to as such by A. L. Veazie, one of defendant's attorneys.

(Signed) BARNETT H. GOLDSTEIN,
Asst. U. S. Atty.

Filed May 22, 1919. G. H. Marsh, Clerk. [47]

AND AFTERWARDS, to wit, on the 22d day of May, 1919, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit: [48]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,

vs.

HENRY ALBERS,

Defendant.

Assignment of Errors.

Now comes the plaintiff in error, the defendant above named, by his counsel, and presents this assignment of errors, containing the assignment of errors upon which he will rely in the United States Circuit Court of Appeals for the Ninth Circuit, and specifies the following particulars wherein it is claimed that the District Court erred in the course of the trial of said cause:

1. Error of the Court in overruling the demurrer of plaintiff in error to Count Three of the indictment, on the ground that the Act of Congress on which said count of the indictment is based is in violation of

Article I of the Amendments to the Constitution of the United States.

2. Error of the Court in overruling the demurrer of plaintiff in error to Count Four of the indictment, on the ground that the Act of Congress on which said count of the indictment is based is in violation of Article I of the Amendments to the Constitution of the United States.

3. Error of the Court in overruling the demurrer of plaintiff in error to Counts Three and Four in the indictment, upon the ground that the facts stated in each of said counts of said indictment are insufficient to constitute an offense.

4. Error of the Court in overruling the demurrer of [49] the plaintiff in error to Count Three of the indictment upon the ground that said count of the indictment is bad for duplicity.

5. Error of the Court in overruling the demurrer of the plaintiff in error to Count Four of the indictment upon the ground that said count of the indictment is bad for duplicity.

6. Error of the Court in overruling the objection of defendant to the testimony of Judson A. Mead, wherein he was asked the following question: Question: And from that point on, now, I wish you would just tell the jury what you saw or heard as between Mr. Gaumaunt and Mr. Albers at that conversation in the smoking-car; and if you joined in the conversation, state what you said, or what Mr. Albers said to you." And in permitting the witness to answer: He (witness) was merely

listening for the next few minutes. Every few minutes Mr. Albers made some remarks and there was nobody else talking. He says: "Well, I am German and don't deny it. They will never lick the Kaiser, not in a thousand years. Once a German, always a German."

7. Error of the Court in overruling the objection of defendant to the testimony of the witness Erwin C. Bendixen, wherein he was asked the following question by the United States Attorney: "Question: Just go ahead in your own way, without questions from me, and tell what conversation you had with Mr. Albers at that time, or what he said to anybody else while you were present." And in permitting the witness to answer that defendant made the remark, he said he was a German, he was nothing but German, always a German. He said it didn't make any difference to him how he expressed it, you might say, and he wanted to imply—this was in German—and he told witness [50] that on the outside, to the outside world, why, he was an American, but down in his heart he was a German, and when he made that remark witness knew that was a very seditious remark to make, and he said to defendant, "My goodness, you don't mean that!" He said, "You don't mean to say you would go to Germany and fight for the Kaiser?" Witness made that remark to him and defendant got up and said he would go back in the morning. He said he had served the Kaiser twenty-five years, and that America—he said, "I have served the Kaiser twenty-five years, and with America, shit, shit." That is just what he said to witness in German. Witness

knew that much of the conversation. He didn't exactly remember. He warned defendant all the time. That is what he was doing, he was warning defendant against saying those things. Then defendant told—he raved on, you might say, and he told witness he had ten million dollars and he would spend every cent of it to liek America. Then also in this conversation he made the remark, which is a very bad remark, in the German language, it was the remark “Schlach America.” “Schlach America,” in the German language, he takes the word “schlach” means to obliterate. It means to do anything to you against the country. When a man says “schlach” in German he means “schlach you,” he is going to get you. This is witness' translation and that is the way it appears to him. Then, after he saw defendant was of that character and he didn't care what remarks he had made, and would make any threat on us, witness walked out of the compartment and went back to Mr. Tichenor and told him the things that had been said, and Mr. Tichenor said, “Well, he has been saying that to all these men,” and Mr. Tichenor said, “There must be some more to this.” Defendant has been down in San Francisco and he must have been [51] conspiring down there, making a contract or something. Then he asked witness if he would not go back and see if he could get some more—some dope, as he called it, as to contracts or something defendant had been doing down in Frisco. Witness went at once and he talked to defendant and tried to talk to him about several different things and then asked defendant if he had had anything like that to

do—had done anything like that, and he said “no, he hadn’t had anything to do like that. He said he looked at witness, you know, out of the corner of his eye, like that, “Nein, nein.” You understand that means, “No, no,” and he would not talk any more. During his talks with defendant, before that, there were one or two things that probably should be brought up in this case, in regard to that, after witness had introduced himself to him—why, he introduced himself in German, and defendant told him that—in German—“Du bist ein echte Deutscher,” or “You are a genuine German.” Also during the conversation defendant told him that his brothers were also pro-Hun. Well, he said German, which means the same thing. He didn’t say pro-Hun. He said German. He said they were German. He also told witness of some trouble, he knew of some trouble or revolution which would appear in the next ten years, yes, five years, yes, to-morrow, he said. After he told witness this “nein, nein,” or “no, no,” then defendant told witness that he wanted to go to bed, and he went up to the porter and told the porter he wanted to go to bed; then the witness went to the rear of the observation-car again. When he spoke about Germany winning this war he made the remark, “Wir haben Krieg gewonnen”; that means, “We have won the war.” He expressed himself that he was willing to go back—he was going back in the morning. He told witness he had ten million dollars and that [52] he would spend every cent of it to whip America. Witness got off the train at Roseburg about an hour later. He reported to Mr. Tich-

enor what he had heard in that room and made a memorandum of it himself.

8. Error of the Court in overruling the objection of the defendant to the testimony of the witness Henry Cerrano, and permitting said witness to testify, over defendant's objection, as follows: Before October, 1915, I saw Mr. Albers once. He came in the office with a German-American paper and he gave this paper to a young gentleman who was working at a typewriter machine, and giving this paper he says, "Look at that paper; see what the German army is *going*. The German army is doing wonderful and France and England come very easy," and then Mr. Albers went away from that room and the only words I heard after that, I heard these two words, "One Kaiser and One God." I didn't understand well what he said before, if we were going to have one Kaiser and one God, or that we will have one Kaiser and one God, but, all what I am sure "One Kaiser and one God," I heard very well them two words.

9. Error of the Court in overruling the objection of the defendant to the testimony of the witness N. F. Titus, wherein the defendant was asked the following question: Question: "Now, Mr. Titus, what conversation did you have with Mr. Albers concerning the war, commencing about January or February, 1917, and running up to June 15, 1917?" And in permitting the witness to answer that the conversations he had with Mr. Albers were numerous and he was unable to fix any definite day during that entire period when any particular conversation took

place. He recalled very distinctly the nature and substance of the conversations, and, to begin with, the first point that came to the [53] mind of witness was the discussion of Belgium and other atrocities, this topic arising from the current newspaper comments. In discussing those features, that particular point with Mr. Albers, he uniformly made the statement that they were all lies and that the reason they got them in that shape was that the press of America was dominated by the English press, and that if we wished to get the truth of the situation we should read the German papers. He further discussed the trouble that the United States was having with Germany, the Imperial Government of Germany, respecting the various points at issue at that time, the exchange of notes which followed—and he believed—stated himself that the United States was misled in their position and the fact that they were misled was due to the influence of the British press and on numerous occasions emphasizing that point. Defendant frequently discussed the conditions in Germany, his visits over there, his great liking for the condition of living in Germany, the fact that the people there enjoyed life better than they do over here, and in discussing the life in Germany he frequently mentioned, or made comparisons between the institutions in this country and the institutions in Germany, laying particular emphasis on our forms of municipal government, speaking of our State government—its efficiency, etc., and in comparison of the national forms of government, and in every particular case in these comparisons emphasizing the

point that he liked the form of government in Germany better than he did over here, feeling that the forms of government here were maybe swayed by party action, political action, and selfish ends and that the German forms of government were more efficiently and more ably and more conscientiously administered. That occurred along the first part of the year 1917 on numerous occasions. Defendant [54] frequently mentioned at that time that the people in Germany enjoyed life more than they did over here. Well, the first thought that occurred to the mind of witness the first time defendant mentioned that was that he spoke of the convivial spirit of the people over there. He said they would go to a church on a Sunday morning. After church they could meet around at a little beer garden and sit around and play games and have a good time and he felt that the people there enjoyed life more than they did here. It was impossible, witness said, for him to tell whether these conversations took place in April, May, June or July, but the subject was up a number of times and defendant reverted back to the old primary consideration that defendant believed that we in this country were dominated by the British press. That seemed to be a particular hobby of his and he constantly referred to it and reverted to it, stating that we were misled by the British press and he felt that we were not justified in going to the length that we did in actually entering the war.

10. Error of the Court in overruling the objection of the defendant to the testimony of the witness David McKinnon, wherein he was asked the following

question: "Question: "Just state the conversation that took place concerning the war." And in permitting the witness to answer that in 1914 he had a conversation with the defendant wherein defendant said: "What do you think of our British cousins?" "Never mind; before we get through with them we will kill every man, woman and child in England."

11. Error of the Court in instructing the jury relative to the purpose and effect of the testimony sought to be elicited from the witness David McKinnon, while said witness [55] was on the stand, as follows: "This testimony is offered, not to prove the acts that are alleged against him constituting the offense, but to prove or to show, if the testimony has that effect, the intent or not the intent but the bent of the defendant's mind or his attitude towards this country and towards that of Germans, and it will only be admitted for that purpose and none other, and it is admitted bearing upon intent so that the jury is put into possession of the bent of mind or of the attitude of the defendant prior to the time when these acts are alleged to have been committed, to enable them better to say what his intent was and by considering all the testimony in the case, and I will admit it for that purpose. I will say to the jury now that this testimony is not admitted for the purpose of proving the allegations in the indictment or any of them by which this defendant is charged with the offenses therein stated, but it is admitted for this purpose and this purpose only as tending to show the bent of mind of the defendant or his attitude towards this country as compared with his bent of mind and

attitude towards the Imperial Government of Germany, and is for the purpose of aiding you, taking it in connection with all the testimony that will be offered in the case, to determine what his intent was if it be proven that he has made the statements which it is declared by the indictment he has made, and by taking this in connection with all the testimony in the case it will aid you in determining what his intent was in making such remarks or in making such statements as may be proven to your satisfaction beyond a reasonable doubt.”

12. Error of the Court in overruling the objection of defendant to the testimony of the witness Eva T. Bendixen, [56] wherein she was asked the following question: Question: “Now, what conversation was had at that time, if any, between Mr. Nippolt and Mr. Bendixen and yourself concerning the Albers arrest or the Albers case or the charges against him?” And in permitting the witness to answer as follows: Answer: Well, the conversation came about regarding the case, and the fact that Henry Albers had made seditious remarks and that Mr. Bendixen had been asked to go in there and find out whether he really was a pro-Hun or not, and in regard to the matter about the drink it came up in this way: That he told Mr. Nippolt just how it came up, that he felt kind of, perhaps, that if Mr. Albers would offer him a drink it would be all right for him to take it; that he felt it was his American duty to go in there, if these remarks had been made, to see if it really was so; and he told also to Mr. Nippolt that it placed him in a very peculiar position because his uncle was in-

terested in the firm and that his first thought was probably he should wire his uncle and then again he thought it would bring a reflection in some way or other, that he better leave just everything alone.”

13. Error of the Court in overruling the motion of the defendant to take from the jury and to strike out the testimony of the witness Horace A. Cushing as follows: He had a conversation with Mr. Albers in which defendant offered to make a bet with him concerning the outcome of the war. It was shortly after the Germans declared war against France and Great Britain. He offered to bet witness a thousand dollars to fifty cents, and loan witness the fifty cents, that the Kaiser could lick the world.

14. Error of the Court in overruling the motion of [57] defendant to take from the jury and to strike out the testimony of the witness John H. Noyes as follows: Yes, sir, as he recalled it, he made only two bets with Mr. Albers with respect to the outcome of the war. The first bet was made in November, 1914. It was a bet of ten dollars that the Germans would not be in London in sixty days. Mr. Albers bet that the Germans would be in London in sixty days. He knew one other bet that he recalled. That was in December, 1915, that the war would be over April 1, 1916. Mr. Albers said the war would be over April 1, 1916. One of these bets was paid, he didn't know which. Both of them were for ten dollars.

15. Error of the Court in refusing the request of the defendant to direct and instruct the jury to return a verdict of not guilty on Count Three of the indictment.

16. Error of the Court in refusing the request of the defendant to direct and instruct the jury to return a verdict of not guilty on Count Four of the indictment.

17. Error of the Court in refusing to give the following instruction:

The mere utterance or use of the words and statements set forth in the several counts of the indictment does not constitute an offense in any of said counts. Before a defendant is guilty of violating the statute by oral statements such statements must be made wilfully and with the specific intent made necessary by the statute, and such words and oral statements must be such that their necessary and legitimate consequence will produce the results forbidden by the statute.

18. Error of the Court in refusing to give the jury [58] the following instruction:

While it is a rule of law that every person is presumed to intend the necessary and legitimate consequences of what he knowingly does or says, the jury, however, has no right to find a criminal intent from words spoken unless such intent is the necessary and legitimate consequence thereof. A jury has no right to draw an inference from words that do not necessarily and legitimately authorize such inference than to find any other fact without evidence.

19. Error of the Court in refusing to give the jury the following instruction:

If you find from the evidence that F. B. Tichenor, a Deputy United States Marshal, and L. E. Gaumaunt, a deputy sheriff of a county in the State of

Washington, induced and incited, or lured the defendant on, to make the statements charged in the indictment under the circumstances under which it has been testified such statements were made, and that said officers thereby procured the defendant to make said statements, you should find the defendant not guilty upon each of the Counts 1, 2, 3 and 4 of the indictment.

20. Error of the Court in refusing to give the jury the following instruction:

If the defendant was intoxicated at the time of making any of the statements set forth in Counts 1, 2, 3 and 4 of the indictment, to such an extent that he could not deliberate upon or understand what he said, or have an intention to say what he did, you should find the defendant not guilty upon each of said Counts 1, 2, 3 and 4 of the indictment.

While voluntary intoxication is no excuse or palliation for any crime actually committed, yet if upon the [59] while evidence in this case, by reason of defendant's intoxication (if you find he was intoxicated at the time), you have such reasonable doubt whether at the time of the utterance of the alleged language (if you find from the evidence defendant did utter said language) that defendant did not have sufficient mental capacity to appreciate and understand the meaning of said language and the use to which it was made; that there was an absence of purpose, motive or intent on his part to violate the Espionage Act at said time, then you cannot find him guilty upon Counts 1, 2, 3 and 4, although such in-

ability and lack of intent was the result of intoxication.

21. Error of the Court in refusing to give the jury the following instruction :

If the jury finds that the defendant made the statements alleged in Counts 1, 2, 3 and 4 of the indictment, and that said statements were made as the result of sudden anger and without deliberation, you should find the defendant not guilty upon all of said Counts 1, 2, 3 and 4.

22. Error of the Court in refusing to give the jury the following instruction :

Before you can find the defendant guilty under Count 3 of the indictment, you must be satisfied from the evidence beyond a reasonable doubt, first, that the defendant made the statements or the substance thereof alleged and set forth in that count of the indictment; second, that he made said statements wilfully and with the intention to incite, provoke or encourage resistance to the United States *and* to promote the cause of its enemies; and, third, that said statements, if you find beyond a reasonable doubt that any were [60] made, would naturally and legitimate incite, provoke or encourage resistance to the United States and promote the cause of its enemies.

23. Error of the Court in refusing to give the jury the following instruction :

Under the allegations of Count 3 of the indictment *it* the Government must prove to your satisfaction beyond a reasonable doubt, before you can find the defendant guilty, that the defendant wilfully in-

tended by the alleged statements both to incite, provoke and encourage resistance to the United States and to promote the cause of its enemies, and it will not be sufficient for the Government to prove that the defendant wilfully intended to bring about only one of such results.

24. Error of the Court in refusing to give the jury the following instruction:

The words "support," "favor," and "oppose" import wilfulness and intent, and it is alleged in the indictment that the statements set forth therein were made wilfully. Therefore before you could find the defendant guilty under Count 4 of the indictment, you must be satisfied from the evidence beyond a reasonable doubt, first, that the defendant made the statements as alleged in the indictment or in substance as alleged in the indictment; second, that the statements made by defendant, if you find beyond a reasonable doubt that he made any of the statements alleged, would naturally aid, defend and vindicate the cause of the Imperial German Government with which the United States was then and there at war, and would also naturally, necessarily and legitimately hinder and defeat [61] or prevent the success of the cause of the United States in said war; and third, that said statements, if any, were made by the defendant wilfully and knowingly with intent to support and favor the cause of the Imperial German Government in said war, and oppose the cause of the United States therein.

25. Error of the Court in refusing to give the jury the following instruction:

Under the charge of Count 4 of said indictment the Government must satisfy you beyond a reasonable doubt that the defendant criminally intended both to support and favor the cause of the Imperial German Government and to oppose the cause of the United States in the war, and that the statements made, if any, would naturally produce both said results; otherwise you should acquit the defendant.

26. Error of the Court in refusing to give the jury the following instruction:

E. C. Bendixen was produced by the Government as a witness to prove the charges set forth in Counts 1, 2, 3 and 4 of the indictment. You are instructed to disregard the testimony of said witness Bendixen for the reason that the testimony given by him does not tend to support the charges in said counts of the indictment.

27. Error of the Court in refusing to give the jury the following instruction:

The statute upon which the indictment in the case is based is an enactment adopted by Congress for the purpose of aiding the Government's war activities and preventing interference therewith. The statute is operative only when the United States is at war; its operation and application begin when war begins; and when war ends the statute ceases to be [62] operative. All of the provisions of the section of the statute upon which the indictments in the case are based have reference to war activities and war measures of the United States, or to the conduct intended to promote the success or cause of its enemies in the war, so that utterances concerning

the war which are not intended to and do not interfere with or affect in any way the war activities or war measures of the United States and do not promote the success or cause of its enemies, do not violate the statute.

28. Error of the Court in refusing to give the jury the following instruction:

“Promote,” as used in the charge of Count 3 of the indictment, means to help, to give aid, or assistance to the enemies of the United States in the waging of the war.

29. Error of the Court in refusing to give the jury the following instruction:

“The cause of its enemies,” as used in Count 3 of the indictment, means any and all of the military measures taken or carried on by such enemies for the purpose of winning the war as against the United States.

30. Error of the Court in refusing to give the jury the following instruction:

Counts 5, 6 and 7 of the indictment are based upon Section 3 of the Espionage Act as it existed prior to its amendment May 16, 1918. That section of the statute prior to its amendment contained three clauses for which a criminal punishment was provided.

31. Error of the Court in giving the jury the following instruction:

It is proper that I should instruct you as to what [63] is meant by resistance to the United States as used in this law and in this charge. The other words in the law and in the charge are plain and were used

and have been used, in my opinion, in the ordinary, every-day, common-sense meaning.

Resistance as a proposition of law means to oppose by direct, active and *quasi*-forcible means, the United States; that is, the laws of the United States and the measures taken under and in conformity with those laws to carry on and prosecute to a successful end the war in which the United States was then and is now engaged. Resistance means more than mere opposition or indifference to the United States or to its success in this war. It means more than inciting, provoking, or encouraging refusal of duty or obstructing or attempting to obstruct the United States. The element of direct, active opposition by *quasi*-forcible means is required to constitute the offense of resisting the United States under this provision of the law and under this charge of the indictment. The offense, however, may be committed by wilfully and intentionally uttering language intended to promote the cause of the enemies of the United States without necessarily inciting, provoking, or encouraging forcible resistance to the United States. To promote means to help, to give aid, assistance to the enemies of the United States in the waging of this war. The cause of the enemies of the United States means any and all of their military measures taken or carried on for the purpose of winning the war as against the United States. The cause of the United States as used in this act does not mean the reason which induced the Congress of the United States to declare a state of war between the United States and the Imperial Government of Germany. It [64] does

not mean the aims of the war in the sense of the terms of peace to be imposed or the results to be accomplished or the time and conditions under which it is to be brought to a termination. In plain language, it means the side of the United States in the present impending and pending struggle. The words "oppose" and "cause" should be weighed and considered by you as limited to opposing or opposition to such military measures as are taken by the United States under lawful authority for the purpose of prosecuting that war to a successful and victorious determination.

32. Error of the Court in overruling and denying the motion of defendant for an order in arrest of judgment upon the verdict of the jury finding the defendant guilty as charged in Count Three of the indictment.

33. Error of the Court in overruling and denying the motion of defendant for an order in arrest of judgment upon the verdict of the jury finding the defendant guilty as charged in Count Four of the indictment.

WHEREFORE defendant, plaintiff in error, prays that the above and foregoing assignment of errors be considered as his assignment of errors upon the writ of error; and further prays that the judgment heretofore rendered in this cause may be reversed and held for naught and that plaintiff in error, defendant above named, have such other and

further relief as may be in conformity to law and the practice of the Court.

(Signed) HENRY E. McGINN,
VEAZIE, McCOURT & VEAZIE,
Attorneys for Defendant and Plaintiff in Error.
[65]

State of Oregon,
County of Multnomah,—ss.

Due service of the within assignment of errors is hereby accepted in Multnomah County, Oregon, this 22d day of May, 1919, by receiving a copy thereof duly certified to as such by A. L. Veazie, one of defendant's attorneys.

(Signed) BARNETT H. GOLDSTEIN,
Asst. U. S. Atty.

Filed May 22, 1919. G. H. Marsh, Clerk. [66]

AND AFTERWARDS, to wit, on Wednesday, the 22d day of May, 1919, the same being the 70th judicial day of the regular March term of said Court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [67]

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA

vs.

HENRY ALBERS,

Defendant.

Order Allowing Writ of Error.

Now, on this day, this cause coming on to be heard on the motion of the defendant Henry Albers for a writ of error, and it appearing to the Court that a petition for a writ of error, together with assignment of errors, have been duly filed; it is

ORDERED, That a writ of error be and is hereby allowed to have reviewed in the United States Circuit Court of Appeals, Ninth Circuit, the judgment heretofore entered herein, and that the amount of bond on said writ of error be and the same is hereby fixed at \$10,000.00, and that execution of sentence be stayed pending the prosecution of said writ of error.

(Signed) CHAS. E. WOLVERTON,
Judge.

State of Oregon,
County of Multnomah,—ss.

Due service of the within order allowing writ of error is hereby accepted in Multnomah County, Oregon, this 22d day of May, 1919, by receiving a copy thereof duly certified to as such by A. L. Veazie, one of defendant's attorneys.

(Signed) BARNETT H. GOLDSTEIN,
Asst. U. S. Attorney.

Filed May 22, 1919. G. H. Marsh, Clerk. [68]

AND AFTERWARDS, to wit, on the 23d day of May, 1919, there was duly filed in said court a bond on writ of error, in words and figures as follows, to wit: [69]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA

vs.

HENRY ALBERS,

Defendant.

Bond on Writ or Error.

KNOW ALL MEN BY THESE PRESENTS:

That we, Henry Albers, the above-named defendant, as principal, and William Albers and J. T. O'Neill, as sureties, are held and firmly bound unto the United States of America in the penal sum of \$10,000, for the payment of which, well and truly to be made, we bind ourselves and each of us, our heirs, executors and administrators, forever, firmly by these presents.

Sealed with our seals and dated this 23d day of May, 1919.

WHEREAS, at the March term, 1919, of the District Court of the United States for the District of Oregon, in a cause therein pending wherein the United States was plaintiff and the said Henry Albers was defendant, a judgment was rendered against the defendant Henry Albers on the 17th day of March, 1919, wherein and whereby the said defendant was sentenced to be imprisoned in the United States penitentiary at McNeil's Island for a period

of three years and to pay a fine of \$10,000.00, and the said defendant has sued for and obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to review the said judgment and sentence in the aforesaid action and a citation directing the United States to be and appear in the said United States Circuit Court of Appeals [70] for the Ninth Circuit at San Francisco, thirty days from and after the date of said citation, which citation has been duly served.

Now, the condition of the obligation is such, that, if the said Henry Albers shall appear, either in person or by attorney, in the said Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for a hearing of said cause in said court and prosecute his writ of error and abide by the orders made by said United States Circuit Court of Appeals and shall surrender himself in execution as said Court may direct, if the judgment and sentence against him shall be affirmed, then this obligation shall be void; otherwise to be and remain in full force and effect.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 23d day of May, 1919.

(Signed) HENRY ALBERS. (Seal)

WM. ALBERS. (Seal)

J. T. O'NEILL. (Seal)

In presence of

(Signed) J. C. VEAZIE.

G. H. MARSH.

State of Oregon,
County of Multnomah,—ss.

We, William Albers and J. T. O'Neill, each being duly sworn, say that I am a resident and freeholder in the State of Oregon and that I am worth the sum of \$25,000 over and above all my just debts and liabilities and exclusive of property exempt from execution.

(Signed) WM. ALBERS.
J. T. O'NEILL.

Subscribed and sworn to before me this 23d day of May, 1919.

[Seal] (Signed) G. H. MARSH,
Clerk United States District Court, District of Oregon. [71]

Approved this 23 day of May, 1919.

(Signed) CHAS. E. WOLVERTON,
Judge.

State of Oregon,
County of Multnomah,—ss.

Due service of the within Bond on Writ of Error is hereby accepted in Multnomah County, Oregon, this 22d day of May, 1919, by receiving a copy thereof duly certified to as such by A. L. Veazie, one of defendant's attorneys.

(Signed) BARNETT H. GOLDSTEIN,
Asst. U. S. Atty.

Filed May 23, 1919. G. H. Marsh, Clerk. [72]

AND AFTERWARDS, to wit, on the 26th day of May, 1919, there was duly filed in said court a bill of exceptions, in words and figures as follows, to wit: [73]

In the District Court of the United States, for the District of Oregon.

UNITED STATES OF AMERICA

vs.

HENRY ALBERS,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED, that the above-entitled cause came on for trial in the District Court of the United States for the District of Oregon on the 25th day of January, 1919, before the Hon Charles E. Wolverton, Judge, and a jury duly impaneled to try the cause, the Government appearing by Bert E. Haney, United States Attorney, and Barnett H. Goldstein, Assistant United States Attorney, for the District of Oregon, and the defendant appearing in person and by Henry E. McGinn, John McCourt and Ralph Citron, his counsel.

Whereupon the opening statements having been made by the counsel to the jury, the following proceedings were thereupon had:

Testimony of Judson A. Mead, for the Government.

JUDSON A. MEAD, was called as a witness on behalf of the Government, and being first duly sworn, testified:

That his home is in Los Angeles, California, where he has lived about seven years. Prior to that, except a short time in the northern part of Los Angeles County, he lived in Santa Barbara County from July, 1907. Prior to that he had been most of the time in Contra Costa County, California; six months or so in Santa Clara County, California. In 1901, May, he thought, he landed at Spokane, Washington, from the east. Was in Spokane and vicinity about four months. Went from there to Seattle, was in Seattle until he sailed [74] for San Francisco, about three days before December, when he arrived in San Francisco, in 1901. Prior to going to Spokane his home was in Wellsville, Allegheny County, New York, but he had been in the oil fields of McKean County, Pennsylvania, for several years before this. The previous September he had left Bradford and been in the Indiana oil fields until that spring, when he left for the west. He was born on what was known as the Mead Homestead in Trapton Brook, about two and one-half miles from Wellsville, Allegheny County, New York. Aged 45. Registered in the last draft, at Huntington Park, a suburb of Los Angeles, the night before September 12, 1918, as he was going out of town next morning. Went to the headquarters and filled out his questionnaire some time later. He is a man of family, a wife and two boys. He left Los Angeles

(Testimony of Judson A. Mead.)

Sunday night, October 6, on a trip of investigation of the prospective oil fields in Northern Canada. He was employed by others. At that particular time his business was the investigation of those oil fields. He went from Los Angeles to San Francisco, coming north. Crossed the bay about nine o'clock and went to be on a sleeping-train an hour or two before pulling out time. It leaves there about eleven o'clock at night, something like that. Thought the train was known as Oregon No. 54. It was the 7th of October that he took the train. At that time he was not acquainted with L. W. Kinney, or L. E. Gaumaunt. Met Gaumaunt on the train next day. Did not know Mr. Bendixen prior to that time and never saw him to know who he was until two days ago. Did not know F. B. Tichenor or Mr. Kinney prior to getting on the train, neither did he know Mr. Albers. First saw the defendant, Mr. Albers, along near noon. Noticed that there was a berth in the car that was not [75] made up until much later than the rest. Along near noon (October 8) the day after he got on the train. Don't remember of seeing him again that afternoon until in the evening. Might have seen him pass through the car, but made no note of it. Remembers next seeing him perhaps about eight o'clock in the evening of the 8th. They were somewheres this side of Ashland, on their way north. Saw Mr. Albers in the smoking compartment of the observation-car. The first time he saw Mr. Albers in the smoker there was no one in there except this Gaumaunt, L. E. Gaumaunt. It might have been a

(Testimony of Judson A. Mead.)

little after eight o'clock. He thought Mr. Gaumaunt and Mr. Albers were engaged in conversation. Knew they were, in fact. Heard them talking. Witness had been talking to Gaumaunt previously during the day. They had not talked about Mr. Albers. Had not heard his name mentioned. He was not sure but there was some remark made wondering why his (Albers') berth was not made up that morning until later. Outside of that nothing was said concerning Mr. Albers. Did not know who Mr. Albers was at the time. Didn't know anything about who was in the berth. Knew somebody's berth was not made up as late as about noon. May have discussed that with Gaumaunt. Was not sure he did. Witness and Gaumaunt had not discussed Mr. Albers in any other manner prior to the time witness went into the smoking compartment, about eight o'clock in the evening. When he went in there Mr. Gaumaunt and Mr. Albers were some little time—for some minutes, perhaps ten or fifteen minutes, didn't know exactly. the talk was all common place. He paid no particular attention, although he entered into some of the conversation, that is in common place remarks. He did not sit down in the smoking-compartment. He was standing there. [76] Mr. Albers was sitting down and this Gaumaunt was half sitting down and half standing up, leaning back against something.

Thereupon the witness was asked the following question:

Q. And from that point on, now, I wish you would just tell the jury what you saw or heard as between

(Testimony of Judson A. Mead.)

Mr. Gaumaunt and Mr. Albers at that conversation in the smoking-car; and if you joined in the conversation, state what you said, or what Mr. Albers said to you.

Defendant thereupon interposed the following objection to the question last set forth:

Mr. McCOURT.—If your Honor please, we want to interpose an objection to that question, for the reason that it is incompetent, irrelevant and immaterial. The indictment charges that the conversation on which these charges are based at this date occurred in the presence of Gaumaunt, Bendixen, Tichenor, Mead, Kinney and others. Now, if this is competent at all, it would be competent as to other statements; but before it would be competent, it would be necessary for the Government to prove the conversation, or offer to prove the conversation charged in the indictment as occurring in the presence of these people that are charged.

The Court thereupon overruled defendant's objection, to which ruling defendant saved an exception, which said exception was allowed by the Court.

Thereupon the witness continued his testimony as follows: He was merely listening for the next few minutes. Every few minutes Mr. Albers made some remarks and there was nobody else talking. He says: "Well, I am a German and don't deny it. They will never lick the Kaiser, not in a thousand years. Once a German, always a German." Witness was looking right at him. They had been carrying on for perhaps five or ten or twelve or fif-

(Testimony of Judson A. Mead.)

teen minutes a common, ordinary conversation, [77] as people will meeting in the smoker, and no particular interest to him. He didn't remember what was said. And something was said, some remark made, he thought by this-Gaumaunt, something concerning the war, and that was the time that Mr. Albers made these remarks. He had been sitting there talking and visiting with them for a few minutes before this. After he made these remarks he swung his arms—threw his arm back some way, made some gesture with his arm, and started some kind of a recitation which witness thought was in German. As witness remembered it, he was using the words "sprechen," "Rhine," and "offen," and as he understood that sprechen meant speech for German he thought it was in German what he said. Didn't know. Didn't understand it, however, whatever it was. Don't speak German himself. That was all he heard just then. He got up and walked out of there. This man Gaumaunt introduced him to this man Tichenor at this time, just outside the smoking-room. He didn't remember that he had seen Tichenor before that time on the train. Gaumaunt went outside at the same time he did. Went there and introduced him to this man (Tichenor). Then he, witness, made notes of these remarks that Albers had made in his presence. Soon after he went back into the smoker to see if he was going to make any more remarks of the same line. He made notes of what he had heard in there because Mr. Tichenor suggested that he might be called as a wit-

(Testimony of Judson A. Mead.)

ness for the Government on that account. Tichenor suggested that he make notes of what he saw or heard, and he did so. Didn't think there was anyone in the smoking compartment when he went back; wasn't sure. Soon after he went in someone else came in, but didn't remember who that was. He and Mr. Albers talked a very little after he went back into the smoking compartment. There was a few commonplace [78] remarks that he didn't remember, then Albers looked at him and says: "Do you play the oil game"—or he says, "Do you play the game?" Witness said, "I play the oil game pretty strong." Albers then asked witness the second time if he played the game. Witness replied, "Nothing much but the oil game." Albers says: "You don't know what I mean. You are a damn fool." Didn't think there was anybody present at that time, but wasn't certain. Albers' condition at all the time that they were talking to him was of a man that had been drinking but not to such an extent that it impaired his possession—thought he was in full possession of all his mental faculties at that time. Whether he was in possession of them physically or not he didn't know because he didn't see him walk. He was very emphatic in these statements. Didn't remember that Albers made any gestures so long as they were carrying on the ordinary conversation, but at the time that he made these remarks he was gesturing—thought with the left hand, but didn't know. Knew he was gesturing with one or the other of his hands or arms, or both. Didn't re-

(Testimony of Judson A. Mead.)

member exactly how the gestures were. Under the impression that he had his hand or arm—didn't know whether his fist was closed or his hand—it was his impression that he was doing something with this arm. Knew he was with one or the other of them, but didn't remember as to that. Didn't think there was anything about his actions that indicated he didn't have possession of his faculties. At the time witness went back in there before he made these last remarks there were several people—didn't know exactly how many, but should guess somewhere from one to six people, one after another came by the door and pulled the curtain out like that and took a sharp look at Mr. Albers like that, closed the curtain and went on again. And after that was [79] done Mr. Albers didn't say anything for several minutes, probably four or five minutes—didn't say a word. Don't know why. It was just after that—when he said "Do you play the game?" was the first thing he said after that, witness thought. Had never seen Tichenor until after he went out of the smoker after hearing these first statements, that is, never had seen him to know him. At the first conversation no one had suggested to him that he go in there for the purpose of listening or hearing, just happened in there and stopped to talk a minute. At the time Mr. Tichenor suggested that he make notes he says, "That is Henry Albers, of Portland, a big millman." That was after witness heard this first conversation. Didn't recall having seen Mr. Tichenor or Mr. Kinney prior to that time. Never saw either of them to

(Testimony of Judson A. Mead.)

know them until since he had been in Portland the last two weeks. Gaumaunt is the only one of the parties connected with this matter he had seen prior to the time he went in and found Albers and Gaumaunt talking the first time in the smoking-car.

On cross-examination the witness further testified: Yes, he supposed Mr. Gaumaunt was acquainted with Mr. Tichenor. When he came out there Gaumaunt introduced him, anyway. He inferred that Gaumaunt had had some conversation with Mr. Tichenor before he went in there. He understood Gaumaunt to say that he was in some kind of a public capacity previously in the day. Wasn't sure whether Gaumaunt displayed a star to him or not; didn't remember that he did that. Thought they talked there probably longer than ten or fifteen minutes before Mr. Albers said anything at all about the war and thought what he said was in response to something Mr. Gaumaunt [80] said about the war. Didn't remember what it was Gaumaunt said about the war, because it was just a commonplace remark that started this up. He didn't pay any attention until he heard these other remarks. Didn't remember that Gaumaunt said something about the Germans in order to get a rise out of Albers. Didn't remember what the remark was, so there would be no use trying to recall it. It was something that started the conversation; that is all he knew. Construed the remarks as of a pro-German character. He was under the impression that the recitation was something pro-German in character, but was not

(Testimony of Judson A. Mead.)

sure. Don't know for certain whether it affected the war or referred to the war or not, as he didn't understand the German language. Didn't know as to whether Gaumaunt pretended to understand the German language. Didn't remember whether Gaumaunt talked German to Albers at all, and didn't know whether Gaumaunt put down any statements or not. Only knew his own actions. Went out very soon after the statements were made and put them down in writing. Wasn't sure whether they went out and left Albers alone, because some of this time there had been another party in there. Didn't know who he was; it might have been this man Dixon. No one went out with him that he remembered anything about excepting Gaumaunt. Had carried the notes he made in his coat pocket in the front leaf of his note-book, torn loose, ever since. Had them now. Thought Tichenor copied them. Wasn't sure exactly how that happened, but thought Tichenor copied them right out of his book. The statement that he made first is put down second there. He put down the statement that he thought was most important first. Wrote them on the train. Claims that the statement, "I am a German and don't deny it," was the first statement defendant made. Some explanation (?) brought up [81] that remark. The statement, "Once a German, always a German," was the third statement that he made, as witness remembered it. The statement, "I am a German and don't deny it," is in between those two. Yes, sir, the second statement he made was, "They can't lick the

(Testimony of Judson A. Mead.)

Kaiser, not in a thousand years." Mr. Tichenor and Mr. Gaumaunt didn't stay right beside him while he was writing it, but they were close by there, some place. He sat down and wrote his own notes. Mr. Tichenor copied his notes, and he thought Mr. Tichenor had another remark put down there. That is all the notes he made. All he knew anything about, only as it was something unimportant.

The memorandum made by the witness was thereupon offered in evidence by the defendant in connection with the witness' testimony, received without objection and marked Defendant's Exhibit 1.

Thereupon the witness was asked the following question:

Q. Now, do you mean to tell this jury that a man who had ten minutes acquaintance with you, and called you a damn fool right off the reel, was not drunk? A. I don't mean—

Q. And pretty drunk?

A. I don't mean anything about that, Mr. McCourt. I didn't say at any time that he had not been drinking. I say that I said at the time that he made these remarks that I thought he was in possession of all his faculties. As a matter of fact, he had been drinking considerably between the time of these first remarks and these latter remarks.

The witness, continuing, testified: Well, he might have been there more than half—probably was there more than half an hour altogether, probably three-quarters—possibly [82] an hour altogether from first to last, but this conversation, when he called

(Testimony of Judson A. Mead.)

him a damn fool, was within a very few minutes after he had engaged in conversation with him. Yes, he expected twenty minutes, probably, twenty or thirty minutes at the end of the first conversation, perhaps. From the first to the last he supposed defendant had had probably four or five drinks. Didn't think Gaumaunt drank with him all the time, but was certain that he saw Gaumaunt drink at least twice. Took a drink with him once himself; once only. Defendant seemed to be generous with his booze. Seemed to be a hail-fellow-well-met in the beginning. The German recitation was given immediately after he made these first statements given by witness. Thought it was ten or fifteen minutes. He didn't stand up to recite; made some gestures during that. Witness thought he was very emphatic about the recitation. Did not remember that defendant asked if witness knew what he was saying or what it meant. Witness is within the registration age. Didn't think he had his registration card with him. Didn't know that he was supposed to have that since the armistice was signed. Thought if he ever lost it and needed it the worst could be the charges of a telegram down to see whether he had or not. Was born July, '73. Believe he claimed an exemption. Didn't remember that he received a classification card. Well, yes, he asked to be put in a class that a man who had a wife and other dependent children had a right to claim. They hadn't sent out the questionnaires for his age at this time, but the fact that his people wanted him to make a trip of inspection

(Testimony of Judson A. Mead.)

into the Canadian oil fields made it necessary for him to make out a questionnaire. He went down there and got this out hurriedly with the help of a storekeeper down there who had volunteered for this work. Yes, [83] his wife signed it. Thought she signed the exemption claim, whatever it was. Didn't hear defendant make any more remarks that he thought were seditious, except as he has told here. Never saw Tichenor in the smoking compartment, before or after. Didn't remember he was out with his ear up against the curtain. Knew that after this—after he had been out there and made notes, he saw Tichenor there in the hallway near the curtain to the smoker. He was out and in, and in the smoker two or three or four times after that. Saw the porter ask Albers to go to bed. Was in there once when the porter asked him to go to bed. Didn't see the porter take his grip. Saw the porter in there. At the time he heard the porter say this remembered of no one being in there but himself. Might have been, but didn't remember. No, that was after this conversation occurred. Thought at this time the porter came in there was shortly after he had made these remarks that witness heard. He wasn't in there much after that. He was in there and out, but at this time he happened to be in there and he thought alone with defendant when the porter came in and asked him to go to bed, and didn't see the porter take his grip out. Didn't know where Gaudmaunt was then, nor Tichenor. Didn't know whether that was after he met Tichenor. He inferred

(Testimony of Judson A. Mead.)

they (Tichenor and Gaumaunt) were right there some place handy in the front end. Albers didn't show any inclination to go to bed or not to. He didn't pay any attention to them that he could see. No, he wasn't in a condition pretty far advanced in stupor at that time. He had been drinking so much that he was drunker than he had been earlier, but still he was in pretty good shape. Thought he was drunker than he had been before. Didn't see him go to bed that night. Didn't know a thing about whether he tumbled into his berth [84] and slept there with his clothes on all night. In speaking of the smoking-room he referred to a little room there, wash-room; yes. Thought about two or three basins in it. Thought one seat there that would probably seat two reasonably comfortably. Didn't remember whether there was one seat where one could sit. Thought if more than three men in there the rest had to stand up. Thought some of the time this other party that he didn't remember sat down beside defendant at one time. As he remembered, the fellow he didn't know was a man perhaps five foot eight inches tall, and weighed anywhere from 145 to 160 pounds, and was dressed, a suit that would not be black nor it would not be grey, something between. A very dark grey. Thought you would call him reasonably dark, not particularly dark, brunette, perhaps. He didn't see anyone making notes except Tichenor and possibly Gaumaunt. Not sure if Gaumaunt made notes or not, but knew Tichenor did. The only time he remembered seeing

(Testimony of Judson A. Mead.)

them making notes was about the time he was making his notes, and supposed that it referred to the same conversation. Didn't know what they made on their notes. Never volunteered or enlisted, or attempted to volunteer or enlist as a soldier, prior to the time he was within the draft.

On redirect examination the witness testified that he arrived in Portland the next morning, about seven-thirty. Didn't remember exactly. Was in Portland about thirty minutes, he thought, just had lunch and took the car on to Seattle. Went to Seattle. Had some business there that took him a day and a half. From there went to Vancouver, was in Vancouver searching for some data that he wanted and went from there to Calgary, to Edmonton; was in Edmonton he thought three days. Went from Edmonton to [85] Peace River Landing and from there down Peace River, a matter of about fifteen or sixteen miles. Back up that night to Peace River, in Peace River village and surrounding country for three days and then back on the Edmonton Railroad back to High Prairie. Communication of the Chief of Police at Edmonton brought him back to Portland. About the 30th or 31st of October. At that time he went before the grand jury. That is the reason and the manner in which he got back here. At the beginning didn't have any personal interest in the matter, but after he heard him make those remarks he had considerable interest just then. Felt like feeling his wool. Didn't report the matter to anybody but Mr. Tichenor.

(Testimony of Judson A. Mead.)

On recross-examination the witness testified: That before anything came up of this thing at all he took just one swallow with Mr. Albers. Only took one swallow the whole day. Saw Gaumaunt take two or three little drinks. He would not be sure, knew he saw him take as many as two. It was some time later the defendant called him a damn fool. That was one of the last things he heard him say. Thought he was drunker at this time, considerable drunker than he was before. Would have expressed the fore part of it as being mellow. Witness didn't make any verbal statement of the fact that he resented these statements. His face probably did, because he felt it quite strongly. Didn't know whether defendant was hardly clear enough to see that. Didn't ask whether he did or not, because if he said anything at all just then he would probably hit defendant. A little while later defendant called the witness a damn fool.

**Testimony of Frank B. Tichenor, for the
Government.**

Thereupon FRANK B. TICHENOR was called as a witness in behalf of the Government, and being first duly sworn, [86] testified as follows:

At this time does and on October 8, 1918, did occupy the official position of Deputy United States Marshal. Lives in Portland. Has been Deputy United States Marshal for sixteen months, continuously. On October 8, 1918, he left Portland at one o'clock A. M. for Grants Pass, where he arrived

(Testimony of Frank B. Tichenor.)

around noon, something like that. Did not just remember. Had several subpoenas to serve in the case of United States versus Smull. Made services at Rogue River, Fruitdale or Fruitvale, and Grants Pass. He got to the depot in time to catch the train back that night. The train was a little late, as he understood, Caught the train at Grants Pass at 6:45 or 6:50. He had finished there, and was on his way to Roseburg. Had some warrants at Roseburg to serve. Had his dinner on the train. Didn't know who was on the train or who was going to be on the train. Had no business on the train except to get himself from Grants Pass to Roseburg. At that time knew Henry Albers only by reputation. He had heard the name, but had never met him. Didn't know he was on the train when he got on. He had not met L. M. Kinney, L. E. Gaumaunt nor E. C. Bendixen. Knew none of them, and didn't remember of meeting them previously. As soon as he got on the train he went immediately to the dining-car. From there he went to the observation-car. Had a ticket for a seat there in the observation. Went back there. Probably he was half an hour or three-quarters of an hour in the dining-car, didn't just remember. He went into the observation and there wasn't any seats; some were standing, so he left his grip there and went into the smoking compartment and on into the lavatory. Didn't notice who was in there at the time. When he came out was when he first met defendant, but didn't know who he was until some time [87] after that. Had never met him before. Defendant was seated

(Testimony of Frank B. Tichenor.)

in the smoking compartment. Wasn't doing anything at the time. Man was standing up. Afterwards found out it was Mr. Gaumaunt or Gaymant; didn't know how you pronounce it. Yes, had a conversation at that time with Mr. Albers. There was a bottle, a pint bottle, supposed to be liquor, setting near him, and he asked him where the cork was and to put it away. Didn't remember whether defendant answered him or not, but Mr. Gaumaunt took and set it down in the corner. Didn't know who Albers was at the time, and had never met any of the other witnesses. He went out of the smoking compartment, went out into the hall. Shortly Mr. Gaumaunt came out to him and wanted to know if he was an officer, and he told him he was, and Gaumaunt told him there was a bad pro-German—some words to that effect—in there and that there was a man who was going to clean him. Witness had better take care of him, and witness told Gaumaunt to go get this party and bring him to witness. They had a little conversation about it. Gaumaunt brought Mr. Mead. Witness told them they could not get anywhere by going in and beating the man up, and for them to go in and find out what he said and try to find out who he was and to remember anything that was said. He stood outside, as Mr. Gaumaunt told him that the party in there had recognized him. Yes, knew the witness, and, of course, going in there probably he could not find out anything. He heard defendant say at one time, that is when Mr. Mead was in there, "Once a German always a German." He was standing by the curtain on the outside. Later on, he didn't just

(Testimony of Frank B. Tichenor.)

remember who was in there at the time, but when some of the conversations were in there Mr. Mead wasn't in at that time when he said, "What right has this Government to tell me [88] what to do?" That is all witness heard. Some time afterwards, after he had been talked to by Mead and by Gaumaunt, a man by the name of McKinney informed witness that the man who was supposed to be making the objectionable statements was Mr. Henry Albers, of the flouring-mills. Witness left the train that night at Roseburg, about eleven o'clock. The next morning he phoned the United States Attorney's office and reported what was said and who the party was and all about it, and that he would be in that night. Phoned from Roseburg. When he last saw Mr. Albers he was seated in there. Witness saw defendant when witness was in the compartment and when witness looked in there two or three times. Kind of looked through the curtain, but didn't pay much more attention. He left it to these other parties, because he could not go in and he could not stand there very long in this hallway because people were passing in and out and he would have to step back and it was crowding the passageway. He was at the doorway very little. The only time that he was looking at defendant through the curtain was when he made the first remark, and defendant hit his knee and seemed to be somewhat bitter in saying that. The other time there was someone standing, and he didn't see defendant's face when he made the second remark. He didn't see the man drinking, but he

(Testimony of Frank B. Tichenor.)

would judge the man had been drinking. He wasn't lying down; he was sitting up and witness could not tell, just only he would judge the man had been drinking, but he cannot say whether there was anything to indicate that defendant did not have command of his faculties and was not in control of himself. He spoke very distinctly. There wasn't any mumbling.

On cross-examination the witness testified he would [89] not state exactly the time he got into the smoking compartment, because he didn't know how long he was in the dining-car. Should judge he got off at Roseburg about eleven o'clock or something like that. No, Albers wasn't in that wash-room when he got off the car. He understood he was—went to his berth, because the witness was in there afterwards before he went off the train. He didn't see defendant in his berth. Didn't know that defendant went to bed there with his boots on that night. When he first saw Albers in the wash-room there was one man there standing up. That was Gaumaunt, or Gaymant. Gaumaunt was not talking to Albers while witness was there. Didn't stand there very long. That compartment was just a small smoking-room at the end of the observation-car. Probably the wash-room. He knew it was a small room, much smaller than the average smoking compartment or wash-room on a car—Pullman. Probably six by seven. As he remembered it, there was just one seat. Didn't remember, but probably three or four. Didn't remember whether that many; didn't pay attention

(Testimony of Frank B. Tichenor.)

to the seats. Albers was occupying that seat. Had his grip in there. Didn't know whether it was liquor he had in the grip or not. There was a pint bottle, he supposed was liquor. Defendant did not ask witness to take a drink. Witness asked defendant to put it away. He didn't see the quart bottle. Didn't see them drinking in there when he was standing outside the curtain. Didn't hear them discussing drinks. Didn't notice anything of that kind; didn't see anything, because he only looked in there two or three times, just kind of peeked in through the curtain. Once in a while you could hear the conversation plainer than you could other times. They spoke English when he heard them. The only remarks he heard, as far as this case is concerned, [90] were, "Once a German always a German," and "Why should this Government tell me what to do?" Didn't know what it was caused Albers to say "Once a German always a German"; could not hear the conversation. Does not know what occasioned the remark. Don't know the drift of the conversation up to that time. Never heard pretty good citizens say during the war, "Why should this Government tell me what to do." Gaumaunt told him that he was a Special Deputy Sheriff, or something, in King County, Washington. Gaumount came right out and asked him if he was an officer and he told him who he was. Witness understood that Albers recognized him and mentioned something in the car about it, is why Gaumaunt came out, or probably by his action in telling defendant to put up, put away the liquor, or something. He didn't know why. Never had seen de-

(Testimony of Frank B. Tichenor.)

defendant before, and defendant had not seen him, as far as he knew. Didn't know what reason defendant would have for recognizing him. Didn't think defendant had his picture. Didn't think he ever saw his picture. Understood that Mr. Albers made some remark after witness left the smoking compartment about him. Didn't know what the remark was. Gaumaunt asked him if he was an officer. Witness then asked Gaumaunt to go find this man that he referred to that was going to clean up Mr. Albers, as he was very angry about the remarks. These things happened before he ever got into the car and he told Gaumaunt to bring him to witness. He brought Mr. Mead. Then he told Mr. Mead that he could not get anywhere by going in there and beating up a man, for him to go in there and find out who it was and try to find out what the man was saying and remember what he said, and had him put it down in his notebook, anything that was said, so he could remember. [91] Never heard that Mr. Albers had called Mr. Mead a damn fool. Mr. Mead and Mr. Gaumaunt went in there pursuant to that arrangement. Mr. McKinney was also brought to him. Didn't remember whether it was Mr. Gaumaunt who brought him or not, but someone brought him to him at the writing desk in the observation car. Mead and Gaumaunt had been in before that. Didn't know how long that was before he got connected up with Kinney. He knew Mr. Mead was in there when the first remark was made. When the last remark was made he was outside, he remembered, and someone else was in there. Didn't

(Testimony of Frank B. Tichenor.)

remember which one of them was in there at that time. It wasn't Gaumaunt that was in there. Gaumaunt did not stay there all the time. Yes, they brought him another man. Thought Mr. Gaumaunt brought him Mr. Bendixen. After quite a little persuasion, Mr. Bendixen said that his—before that, why, Mr. McKinney had told him that the party was Mr. Albers, then Mr. Bendixen was brought to him and he asked him to go in there and he said that he didn't like to go in. It placed him in a very embarrassing position, that he had an uncle who was a stockholder in the Albers Company, and witness told Bendixen that he was a pretty poor American citizen to refuse to go in there to find out anything that he could in this case, and then he consented and went in. Bendixen told him he was able to speak German. That wasn't exactly the reason for having him in there. He wanted more than two witnesses for the case. Well, he knew it was a very good proposition to get a number, and he knew that one witness would not do in a case like that; would rather have four or five witnesses. Up to this time all witness heard Mr. Albers say of a seditious character was "Once a German always a German," and the further remark [92] "Why should this Government tell me what to do?" The other men who had been in there had told him other things that had been said. Mr. Mead had told him what he heard and Mr. Kinney told him. Mr. Gaumaunt had told him things that he had heard. It wasn't what he heard why he was interested, it was what they told him that had been said. He didn't tell anyone to take any drinks

(Testimony of Frank B. Tichenor.)

or anything of that kind. Didn't know whether or not Bendixen would have to take a drink with Albers. He had no jurisdiction over Bendixen going in there and drinking, if he wanted to. Didn't remember of Bendixen saying he didn't want to go in there, because he would have to take a drink with defendant. He understood the conversation was carried on in German after Bendixen went in there. Didn't hear it. He was back there at the desk taking notes. Didn't see the porter trying to take Mr. Albers to bed before this conversation commenced or during it. Did not see the porter carry defendant's grip away. Didn't see Gaumaunt come and take it away from the porter and take it back.

Testimony of L. W. Kinney, for the Government.

Thereupon L. W. KINNEY was called as a witness in behalf of the Government, and being first duly sworn, testified as follows:

Has resided in Portland twelve years. Prior thereto lived in Boston. Merchandise broker. Going on four years. Previously was commercial traveler. For Allen and Lewis and Pacific Coast Syrup Company. Was with Rupert & Company, brokers, for a short time. On the night of October 7, 1918, was in San Francisco. Left on the night train about ten o'clock. Don't remember the number of the train. At that time knew of Henry Albers, but had never met him. Didn't know him by countenance. Did not see him on the train that night. Did not at that time or prior thereto know L. E. [93] Gaumaunt, J. A. Mead, E. C. Bendixen or Frank Tichenor. He

(Testimony of L. W. Kinney.)

didn't know any of these gentlemen were on the train or were going to be on the train. Absolutely none. Saw Mr. Albers on the 8th of October, 1918, shortly after they crossed the California line. Late in the afternoon. Shortly before they left Ashland. Mr. Albers was in the smoking compartment of the Pullman. It was a combination car. Prior to that time had not gotten acquainted with Mr. Mead or Mr. Bendixen or Gaumaunt. There was no one on the train that he knew. Went into the smoking compartment shortly before they left Ashland. Had his dinner after that on the train. Went into the smoking compartment to the lavatory. Knew none of these men before that time. Didn't stay in the smoking compartment. Saw Mr. Albers for the first time then. Nobody was with him. Had no conversation with him at that time. Didn't have any conversation with Mr. Albers until right after dinner. Was at dinner while they were going through Medford. Had seen Mr. Albers before he went to dinner. Didn't remember whether he went in there immediately after dinner, but it was soon after. Didn't remember whether there was anybody with Albers. Didn't have any conversation with him. Fifteen or twenty minutes later witness again went in. Saw Mr. Albers there. Gaumaunt was with him; no one else. Went in there and sat down and began talking with him. One of defendant's remarks was, "Once a German always a German." They were asking him about the war when he made that remark. Another remark he made was, "I served twenty-five years under the Kaiser." Witness said to him, "Do you mean to say

(Testimony of L. W. Kinney.)

you served twenty-five years under the Kaiser?" Defendant said, "Yes, I served twenty-five years under the Kaiser; then I came [94] to this country." He said, "All that I have got in this country, since I came to this country—what do I get in this country? I get shit, shit, shit." He pounded his left hand on his knee. The defendant said that if necessary he could take a gun and fight right here, and still used his left hand on his knee. He also said that we would have a revolution in between two and four years. At first he said two years and then witness checked him up on it, and he says, "No, not in two years, but within two to four years." He also said, "Why should this country tell me what to do?" He also said, "They can't get me." He said that he came to this country without anything and he would go away without anything, if necessary. Witness made notes that night on the train. He went in and came out several times during these conversations with Mr. Albers. Made some notes then, in between. Those notes were destroyed. They were unintelligible to anyone except himself. He made them in a hurry. Yes, heard Mr. Albers say, "They can never lick the Kaiser in a thousand years. I can take a gun and fight right here, if necessary—if I have to." Did not recall anything else. The things detailed did not all occur at one time. Conversation extended over approximately three-quarters of an hour. Thought Mr. Gaumaunt was there most of the time. There were others in and out, but didn't pay much attention to them. Don't know what part they heard. He engaged in con-

(Testimony of L. W. Kinney.)

versation with Mr. Albers himself in regard to this war. It was general conversation. He didn't know what was said by him with reference to any one of these statements that he claimed to have heard. Witness asked defendant how long he thought this war would last, and different things that he thought might interest defendant and himself. The [95] war was in its height at that time. Witness is 48 years of age. Aside from Mr. Gaumaunt, met Mr. Tichenor on the train during this conversation. Might have spoken with the others. Might have spoken to some one, but doubt it, besides Mr. Tichenor. Never remember seeing Mr. Bendixen until the first time up to the court building at the grand jury examination. Did not talk to Mr. Mead. Mr. Albers manner of uttering the language was comparatively clear. He had a cigar in his mouth a great deal, and there were some things that witness could not understand which he would like to know. They were in English. He most certainly should think defendant had possession of his faculties and seemed to know what he was saying and doing. Didn't know what stage a man had to be where you consider him intoxicated. Defendant answered the questions very quickly. Heard others talking with him. Mr. Gaumaunt was talking with him. Apparently defendant did not have any trouble understanding what Mr. Gaumaunt said. Would consider defendant had no trouble in understanding what witness said. He came on through to Portland next morning. Did not talk to defendant about other matters besides the war, not that he remembered of.

(Testimony of L. W. Kinney.)

Talked with Mr. Tichenor on the train about reporting what he had heard. Tichenor didn't direct him to report it here. Came to the United States Attorney's office by subpoena.

On cross-examination this witness testified: He understood that there was someone using propaganda talk and he was a United States citizen and felt that it was his business to hear what he could. Has never been a drinking man himself. Had taken a drink but had never been intoxicated. Never been drunk in his lifetime. Has [96] taken a drink the same as a man would drink and go about his business. Has never been as far as the cup that inebriates. Has had some occasion to take care of a few people sometimes when they were a little intoxicated. Never was intoxicated. Has never been so far that he forgot what he said or was astonished at things that were told him next day that he believed he could not possibly have spoken. Absolutely not. Considered that defendant knew what he was doing. Has seen people that could sit up that were very much intoxicated. Has heard of people being so drunk that next day they didn't know what they said, but knew nothing about it himself. A man that will give you a quick answer he would consider knew what he was doing. He was willing to get any propagandist in these United States. He would not consider that you would have to tell an America citizen that he saw there in the mire that he was in danger and to keep his mouth shut. Would hardly think that it would be becoming to tell a United States citizen to be care-

(Testimony of L. W. Kinney.)

ful of his conversation. If his feelings were such that he could be caught in the trap he thought that he should be caught in the trap. He wasn't there to entrap him. When he traveled for Allen and Lewis seven or eight years ago he carried Albers Brothers line of goods and carried it in his house, too. Always encouraged trade with those people. Witness was the moving spirit of this occasion in this entrapping business. Thought it was his own suggestion to get in and be a part of the game. He didn't speak to Mr. Tichenor until afterwards. Gaumaunt was there. Knows Gaumaunt wasn't the moving spirit in all that was done. Witness thought perhaps he was the starter of the whole thing. He overheard someone speak, could not tell [97] who right now, that there was a propagandist in the smoking compartment. He didn't know Mr. Albers, didn't know his name until Albers told him. Albers could be a propagandist and have a leading business too. He would not say that any reasonable man was so foolish as to jeopardise and risk his whole business for a few words that were spoken on a train at that time. Defendant might have been an unreasonable man in making such remarks as that. He should consider him unreasonable. He should consider any man unreasonable that would make such remarks. Albers was speaking for his country. He told witness that he had served under the Kaiser for twenty-five years. He would not consider such a man crazy, he would think he was a propagandist. He didn't come out in the car and talk openly; he talked back there in the

(Testimony of L. W. Kinney.)

corner in the smoking compartment. Witness went in there and engaged in conversation with him. Asked him about the finish of the war and what he thought. What the Kaiser could do and what he was going to do, etc. No, sir, he didn't note down what he said to defendant. Yes, sir, noted down very carefully what defendant said to him, because he had a right to, because witness was protecting the United States Government. Witness was a United States citizen and was looking for what he might say in regard to disadvantage to the United States Government. Any propagandist is unreasonable. By propagandist he meant a party who is doing work against the Government in this country. After hearing those utterances he thought defendant was doing work against the Government, yes, sir. Did not know, hardly, as a matter of fact, that that man in the presence of five full-blooded, red-blooded Americans, that would talk that way, they would tear him limb from limb, if there had been any reason for it. No, sir, he didn't [98] believe that. Witness certainly did act deliberately, with very great deliberation. It all came to him that quick. Defendant is much older than he. Why should he caution him? He might have gone in there three times, perhaps. No one sent him in there. We went back the second time because he didn't know the first time he went in there that defendant was talking propagandist talk. He overheard a conversation between two other parties that there was a gentleman in the smoking compartment that was talking propagandist. Don't

(Testimony of L. W. Kinney.)

know who the other parties were. It might have been Mr. Tichenor or it might have been Mr. Gaumaunt, but he didn't know them. Or it might have been someone else. He could not tell who it was without speaking an untruth, and he could not do it. He positively could not tell whether it was Gaumaunt or Tichenor he heard talking. He would not say that it was not nor he would not say that it was, because he could not do it without perhaps saying something that he was not positive of. He had been in twice before and defendant had said nothing to him. Most any time he would engage a man in conversation in that manner for the United States Government. He wasn't in the habit of associating with people under the influence of liquor unless he really had business. Before that he gave defendant no chance to say anything to him. Defendant did not say anything to him. After he had overheard this conversation he went down there and engaged defendant in talk, yes, sir. And it was after he engaged defendant in talk that defendant said these things. Tichenor absolutely did not tell him to go there, nor did Gaumaunt. Why should he know who was the moving spirit, Mr. Tichenor or Mr. Gaumaunt. That was beyond him. Didn't know [99] whether Mr. Tichenor or Mr. Gaumaunt were the moving spirits there in that talk that night. He might have been the moving spirit. He wasn't sure as to that. What he did there was entirely upon his own motion. And he told someone, he didn't know who it was, that if there was a propagandist they

(Testimony of L. W. Kinney.)

would get what he had to say and he went back with the idea of getting it. Did not know whether the someone to whom he said that came back with him. Mr. Gaumaunt he thought was in there when he went in. He could not express to whom he addressed that remark and be positive. It might have been Gaumaunt. He would have to talk at random, he could not give an answer to that. It might have been any one of the four or five witnesses; he really could not tell which one it was. At that time he had not separated them to such an extent that he could tell now. Well, he could not guess it. He really could not answer that, because it would be at random and it would not be worth the paper it was written on. After it started he and Mr. Gaumaunt and Mr. Tichenor and Mr. Bendixen were getting together there that night in concert on this propagandist. Didn't know what he called the starter. Didn't know the starting point. They might have been working on the case before he was there; he didn't know. He spent that three-quarters of an hour to an hour and got what evidence he thought he needed, and went to bed, because he was sick all that day. So far as he was concerned the starting point was when he went in there himself; when he went in there to find out what he could hear. He had heard some people say that there was a propagandist in there and immediately went in, yes, sir. He overheard a conversation which wasn't addressed to him and could not tell between whom that [100] conversation was. But after he heard it that became the starting point with him. He

(Testimony of L. W. Kinney.)

went into the car and had this conversation with defendant. After that he went out several times and put his notes down and went back again. He put his notes down on his own motion, right away. Since he became acquainted with Mr. Tichenor, the gentleman that he talked with when he came out was Mr. Tichenor, after he came out of this room. Someone told him that he was an official of the Government, and he talked it over with him. Really could not tell whether it was Gaumaunt told him Tichenor was an official; thought possibly it was Mr. Gaumaunt. Tichenor told him to get more evidence. Then he went back again. "You bet I did." And Tichenor remained on the outside. If he had any talk with Mr. Tichenor before *me* met him after coming out of there he didn't know him at the time. Didn't remember whether Gaumaunt introduced him to Tichenor. He was sure he didn't know who it was, that his memory didn't serve him upon anything that related to the movements that led up to his conversations with Mr. Albers. Possibly he jotted down his notes in Mr. Tichenor's presence, and possibly not. He took some of them in his presence and some of them he took by himself. Could not tell the occasion for dividing up part in his presence and part away from him. Didn't know whether Mr. Tichenor overheard the conversation had at that time. Presumed he did. Mr. Tichenor might have been at the curtain. He presumed likely he was. Well, he was pretty sure that Tichenor was. No, sir, he didn't agree before he went in there that Tichenor was to be at the curtain.

(Testimony of L. W. Kinney.)

Didn't know Tichenor's name even then. Gaumaunt told him that Tichenor was a deputy marshal. He [101] might have gone back on Tichenor's say-so, still at the same time he would have gone back on his own. Tichenor might have told him to go back. He did tell him to go back for more evidence; at the same time witness was there to get what evidence he could himself. When Tichenor told him to go back he went back, absolutely. He should have gone back anyhow, yes, sir. After he came out the second time he jotted down a little more and went back again. And got some more in the third drive. Thought he jotted that down, if he remembered correctly. Didn't remember whether in the presence of Tichenor or away from Tichenor. Didn't think Tichenor told him to go back the second time. Can't remember that Tichenor told him to go back the third time. Didn't know why he should have known that if defendant had been in his right mind his going back three times would have put him on his guard, supposing that he had been the most arrant knave in the world or propagandist, as he termed it. Didn't know why his repeated visits to defendant at that time would have told defendant there was something on there. No, he did not know that it was a fact that defendant was so drunk and the witness knew he was so drunk, that defendant could not recognize him between the first and the second and the third visits.

Testimony of L. E. Gaumaunt, for the Government.

Thereupon L. E. GAUMAUNT was called as a witness in behalf of the Government, and, being first duly sworn, testified as follows:

He lives at Kent, Washington; thirty years of age, past. Registered for the first draft at Local Board in Greenwood District, State of Washington. Didn't know just the number of the Board. Filled out a questionnaire. Received classification in Class 4-A. He is in the automobile [102] business at Kent, Washington. Has been engaged in that business about seven years. Does not hold any official position in the State of Washington outside of a Special Deputy Sheriff for King County. On October 8 he was on a train from Berkeley. Got on the train from Berkeley, California, coming to Portland. Got on the train at eleven something at night on October 7. Bound for Seattle and Kent, his home. At the time he boarded the train he did not know E. C. Bendixen, L. W. Kinney, J. A. Mead or Frank Tichenor. Didn't know the defendant, Henry Albers. Had not met any of these people prior to that time. On the morning of October 8, something like twelve o'clock, defendant got out of bed. His berth was down until twelve o'clock. That is just how witness happened to notice him. Didn't know who he was at the time. That was the day after witness boarded the train. His attention was not directed again to the defendant until witness went into the smoker that night, about a quarter of eight. No one sent him to the smoker, only the observation was

(Testimony of L. E. Gaumaunt.)

full and there wasn't any room in there to smoke. Prior to that time of going into the smoker, right about eight o'clock, he had not had any conversation concerning the defendant Albers with anyone. When he first went in he noticed Mr. Albers and a man whom he later learned was Mr. Bendixen. Didn't know it was Albers or Bendixen at the time. No, sir, he did not hear that conversation between the two of them. In fact, he didn't pay much attention to it. He didn't stay in the smoker then. He came in and took a smoke and went into the toilet and then came back out. Heard nothing particular that he can remember now. Went back the second time pretty close to eight o'clock to [103] smoke. Had not talked to Mr. Bendixen or anyone else concerning the defendant. When he went there the second time, about eight o'clock, he believed Mr. Kinney was present. Didn't know him at the time. Later found out that was his name. He had been talking to Mr. Kinney during the day about business trips, but nothing else. Mr. Kinney was in there, he would not say he was sitting with Mr. Albers, though. He heard Mr. Albers make that remark about McAdoo, McAdoo being a son-of-a-bitch. Defendant did not seem to be addressing anybody in particular. That was the only remark he heard him make. Defendant had been drinking. He believed there was a bottle there on the seat. Albers was sitting down. Defendant's speech about McAdoo was plain; yes, sir. He heard it plainly. After that remark was made he didn't participate in any conversation outside of asking Mr.

(Testimony of L. E. Gaumaunt.)

Kinney who the man was, and didn't he think defendant better be put to bed. This was right after he made this remark. Witness said this right in the room in the presence of Mr. Albers. Nothing else took place, only Mr. Kinney said he thought—he didn't believe in putting a propagandist to bed, or something to that effect, and witness asked Mr. Kinney if he knew who the man was and he said he didn't. After that a gentleman by the name of Mr. Mead, he believed, that heard part of the conversation, that came in there was going to whip defendant, or something to that effect, and then Mr. Tichenor came inside to go to the toilet. He didn't know who Mr. Tichenor was at the time, but later found out it was Mr. Tichenor. Mr. Tichenor came in to go to the toilet and when he came out he saw this bottle there and he said to Mr. Albers—he said, "Put the cork in that bottle and put it away." Mr. Albers [104] mumbled something—he didn't get what it was. Nevertheless he didn't put the bottle away and to avoid further trouble witness took the bottle down and put it away—put the bottle out of sight, and Mr. Mead was getting pretty hot under the collar and witness judged by that that Mr. Tichenor was an officer, telling him to put the bottle away, and he followed out and asked him if he was an officer and he said he was a Deputy United States Marshal, so witness told Mr. Tichenor what was going on in there. Witness said, "That old gentleman is going to be hurt." "I think if you are an officer you had better take care of him," and Tichenor said, "Well, there

(Testimony of L. E. Gaumaunt.)

is a better way of doing it," or something to that effect, and he, Tichenor, asked them to make notes of whatever was said, which they did. Witness returned to the smoking-car then. Right at that time he thought there were two people in there when he returned. Defendant was talking about him being a German—"Once a German always a German." He also said, "I am a German and I don't deny it, and I am pro-Hun and my brothers are pro-Hun." Well, he says he came to this country twenty-five years ago—twenty or twenty-five years ago and thought that conditions in Germany were better than what they were in this country. He thought that this country wasn't as free as Germany. Witness didn't think defendant said anything about the Kaiser. He said something about him not serving in the German army. Defendant said that the United States could never lick Germany in a thousand years. Witness didn't write any notes of what he heard, no, sir. He brought them out and told Mr. Tichenor. Mr. Tichenor made the notes. Defendant said there would be a revolution in this country in ten years, maybe in two years and maybe to-morrow. He said that a Yankee [105] could never beat a German—the Yankees could never beat the Germans in a thousand years, or something to that effect. Witness continued his journey to Portland and next morning he went looking for the District Attorney, which Mr. Tichenor told him to do and turn in a report that he had. Mr. Tichenor told him to report to the District Attorney, which he did. He

(Testimony of L. E. Gaumaunt.)

went to the wrong building first. Found the building afterwards here. Saw the District Attorney. He should say he went and out of the smoking-room during the time that he heard these statements he has related five or six times. Seven times. Each time he came out and told Mr. Tichenor, so he could make notes of what was said. One time Mr. Tichenor was outside the curtain in the hall. The other times he was outside by the desk in the observation-car. Yes, sir, Mr. Albers expressed himself vigorously. He pounded his knee. (Illustrating with his hands.) Witness didn't believe they asked him any questions outside the witness asked him to go to bed and the defendant told him to go to hell. That was about the only question he asked defendant that he could recall.

On cross-examination the witness testified as follows: That his name was Leon; that he was born in New York. That he wasn't born in France. He might have said he was born in France. Might have told Judge McGinn, counsel for defendant, that he was born in France. His father was born in Marseilles. Didn't tell Judge McGinn he was born in Marseilles. Got on the train at Berkeley on the night of the 7th of October. Didn't see Mr. Albers until the next day. Didn't see or hear anything of Mr. Albers until the next day, the next evening. Saw him when he got up in the [106] neighborhood of twelve o'clock. Believe there was some comment made about his getting up at that time. Somebody said that they supposed he got on the train

(Testimony of L. E. Gaumaunt.)

drunk and never got up, something to that effect. He didn't know who it was. Saw him again that evening about a quarter to eight the first time. He was engaged in conversation with Mr. Bendixen. Didn't pay any attention whether they were talking English or German. Witness does not speak German. Speaks French quite a bit. To his children, yes, sir. His wife teaches the children French and is helping witness a whole lot with his French. His wife is a French woman. She comes from Bordeaux. Was born in Belloc, Puro Pyrenees, but was brought up in Bordeaux. He didn't hear anything of the conversation between Mr. Bendixen and Mr. Albers at a quarter to eight o'clock. Went back the second time to smoke. Didn't believe defendant was talking to anybody that he could recollect when witness went there the next time. Had not drunk with him at that time. Later on in the evening took two drinks with defendant. At eight o'clock when he was in there nobody was talking to defendant. Witness did not engage in conversation with him. Mr. Tichenor came in about 8:05 or something like that. Didn't believe anybody was talking with defendant at that time. Witness was in sight of defendant. Defendant had his booze in sight when witness was talking with him. Mr. Tichenor went to the toilet and came out and lighted up a cigar, as near as he can remember, and Mr. Albers was mumbling something to himself. He didn't believe anybody knew what it was at that time, and Mr. Tichenor told him he would better put the bottle away, which he didn't do. The

(Testimony of L. E. Gaumaunt.)

witness thought to avoid further trouble he would put it away. Defendant did not make [107] any remark when Mr. Tichenor told him to put it away; not right there. He did when Mr. Tichenor went out. He said he knew that big son-of-a—meaning bitch, was going to get him or something to that effect. Witness sat there for a second and Mr. Kinney, he believed, was in there with him and Mr. Mead, and Mr. Albers made the remark about McAdoo, and Mr. Mead started to get hot under the collar and witness said to Mr. Kinney, “Mr. Kinney, we better get that old gentleman to bed.” Witness figured he might be some labor man or someone else. Didn’t know who he was. If they could avoid trouble by throwing him into bed, wanted to get him into bed and out of harm’s way. Defendant wasn’t sober; he had been drinking. He seemed to know what he was saying. He sat up straight. Witness had drunk lots but tried to keep people from knowing it. At that time he thought defendant was so that he knew what he was doing. Witness asked him—he believed he asked him himself to go to bed, and defendant told him to go to hell; or something to that effect. Witness showed defendant his star; didn’t show everybody on the train his star. Told Mr. Tichenor what Mr. Albers had said about McAdoo being a son-of-a-b—. Tichenor didn’t say he knew who defendant was. Didn’t tell Judge McGinn that he went down and said to Tichenor, “Do you know who that man is?” and Tichenor said, “Yes, I know who it is; it is Albers, and we have been watching him for two

(Testimony of L. E. Gaumaunt.)

years." There is only one thing he heard them say, defendant had been under surveillance for a year and a half. He believed that was Kinney. Remembered talking to Judge McGinn about this case. Came to Judge McGinn's office in the Oregonian Building. Didn't recall the day. Believed it was the day before or [108] two days before the grand jury was in session. Must have been October 30th. Nobody ever sent for him. Judge McGinn had not seen him before. A suggestion from Mr. George Albers caused him to come to Judge McGinn's office. He had been to see Mr. George Albers over in Seattle, after it was published in the paper. Didn't recall what day it was when he went to see Mr. George Albers? He noticed a piece in the paper about Mr. Joshua Green. They could hardly believe that any such things were said. Went to see Mr. George Albers just to convince him it was said. There was a piece in the paper there where he didn't believe and he didn't see how such a thing could happen. No, sir, it is not a fact he went there to get money from Mr. George Albers. No, sir, it is not a fact he came to see Judge McGinn to get money, only his own (Judge McGinn's) suggestion. Yes, he wrote the letter shown him by counsel. Tried to give it to the lady next door but she would not accept it, and said to put it under the door or put it in the mail box. Left it at Mr. Albers' house. That envelope was addressed by witness; that is his handwriting. The letter is in his handwriting. He tried to leave

(Testimony of L. E. Gaumaunt.)

it next door to Mr. George Albers' house in Seattle, and the lady would not accept it.

Thereupon the letter was offered and received in evidence and marked Defendant's Exhibit 2, and read as follows:

“November 12, 1918.

Mr. G. Albers:

This is something I don't like to do but I can't help it; ever since I got mixed up in your brother's case why I am losing most of my friends down here; I have been upholding him in all respects whenever I was asked about him; my wife also [109] is against me and says if he is saved why she will leave me; now if she wants to she is welcome to go tomorrow and the rest can go somewhere else. What I want to ask you is this, will your brother look after me after the matter is finished. I have a good job here and am making big money, if he is saved why I lose everything, which I cannot afford as I have nothing now only property which belongs to my wife, I am willing to sacrifice it all to save him if he will take care of me after it is all finished, which would be fine on his part. You asked me about when the case is coming up. I didn't think I should tell you but I see your interest is in the business. Mr. Heeny District Attorney, told me it would be either the 24th of this month or ten days later. Our chances are very good, I think. I told Mr. Heeny lots in my letter which the jury did not ask me, and I think he has another viewpoint of the case. I am going to stay

(Testimony of L. E. Gaumaunt.)

with him if they put me in jail, would like to see you but figure it better not to.

Kindly burn this up as it means a lot to me at this time. Kindly let me know your view of this matter. Mr. McGinn told me everything would be O. K. when I told him I would have to leave Kent, so I thought I would ask you. I am a special deputy here, otherwise I would have been licked, I guess.

Hoping everything will be O. K. I remain,

L. E. GAUMAUNT.

Excuse pencil as I am in a hurry and going to Seattle on business and thought it would be a good chance to bring this to your house myself."

Mr. George Albers had told him that he wanted to pay him for his trouble. He wasn't to any trouble, absolutely [110] none. He wanted to get paid to see if George Albers was as bad as his brother was. Yes, sir, he was trying to entrap him, absolutely. He hadn't entrapped his brother, no, sir. No, sir, he wasn't trying to entrap Judge McGinn, too. He came to Judge McGinn's office. Judge McGinn didn't ask him to come there. Told him to make himself at home there. Judge McGinn told him it would be well for him not to see him nor for Judge McGinn to see witness. After they were all finished, yes, sir. Remembered talking to the girl in Judge McGinn's office. Told her the story in regard to what happened on the train. Yes, sir, told it to everybody. Didn't remember saying to Judge McGinn, "Ever since this thing has started I haven't been able to sleep. Albers had been jobbed," or

(Testimony of L. E. Gaumaunt.)

words to that effect, no, sir. Never said Mr. Albers has been jobbed, no, sir. He said something in Judge McGinn's office to Miss Paula Tegen on the 30th of October, 1918, to the effect that he had not been able to sleep since this case started. He said he got into the mixup. He was kind of nervous on it, yes, sir. It is his first time to ever be in Court and get into a mixup. Didn't tell Judge McGinn it was because Henry Albers was being jobbed. Didn't tell him that defendant was so drunk that he didn't know what he was talking about. No, sir, he didn't tell Judge McGinn that the words were put into the man's mouth when he and Judge McGinn were talking together, nor that it was a shame to take a man of that kind and make a crime of that kind against him. No, sir, he said the man was drunk; he didn't say it was a shame. No, sir, he never said it was a shame and an outrage. He might have said something to the effect that he hadn't been able to sleep. He got kind of upset about it, because everybody there in the country [111] was asking him about it. It kind of worried him a little, anyhow. He didn't know how much time he was going to lose, just had to get his wife out of the hospital, had to come down here on indictment. Wasn't figuring to make a little out of it, no, sir. The letter saying, "Take care of you," means just what Mr. Albers said. He wanted to pay witness for his trouble, Mr. George Albers, when he went to him and told him just what his brother had said. He never pestered George Albers and followed him up. He called witness out and told him to go in

(Testimony of L. E. Gaumaunt.)

there and that he wanted to know the conditions, and right in front of his own attorney witness told him just how it happened on the train. No, sir, he never followed Judge McGinn, because all the conversation was in Judge McGinn's office, closed up. Did not say to Judge McGinn at that time, "Suppose that I was a stool-pigeon for Tichenor," no, sir. Didn't say, "Suppose that his job was put up on him and I can establish that there isn't anybody there that knows anything about it and if you have got me away there isn't anything left of this case," or words to that effect, no, sir. Never said "after you get me out of the way," at all. He came back to Judge McGinn's office in the afternoon. Didn't make any offer. Judge McGinn made him no offer outside of saying Mr. Albers is a man that has got lots of money. He and Judge McGinn didn't talk terms, no, sir. He had reference to his leaving Kent when he said in that letter that Judge McGinn said it would be O. K. Yes, sir, Judge McGinn said he would be taken care, Mr. Albers was a man that had lots of money. He assented to that in a way. Judge McGinn didn't state right then what he was to do, no, sir. He didn't recall what Mr. Albers was to take care of him for. [112] He didn't recall that he represented to Mr. Albers and to Judge McGinn that all there was to this case was what he knew of Henry Albers and that if he dropped out there would be nothing left of it, or words to that effect, no, sir. He told everything that happened in front of Mr. Albers' attorney. He told witness, "You tell the truth," and he says, "That

(Testimony of L. E. Gaumaunt.)

man is going to be guilty," and he says, "Stand by that and mention my name, if you want to." Not George Albers himself, this was his attorney. He didn't say it in Mr. Albers' office. He went there to see Mr. George Albers. He invited witness in. Nobody told him to go there. He went there the first time on his own motion, yes, sir. Mr. Albers' attorney in Seattle was at Mr. Albers' office. Witness talked with him. It was after the whole thing was published in the paper. No, sir, it wasn't the 9th or 10th; went on for a couple of weeks, he believed. Didn't recall how long it was before he came to Judge McGinn's office that he went to see Mr. George Albers. Knew of the porter on that train. No, he never said a thing to the porter.

On redirect examination the witness testified that as to the matters that occurred on the train on the day or evening of the 8th of October, 1918, he had testified here to the truth, absolutely, yes, sir. He testified before the grand jury to the same state of facts and in the form of an affidavit made in the District Attorney's office. He believed Mr. Haney conducted the proceedings before the grand jury when he was a witness. Yes, sir, remembered having a talk with the District Attorney after he came out of the grand jury room, at his office, before he went home that evening. District Attorney told him to keep his mouth shut. That was the only [113] thing he had told him to do. He had not told the District Attorney or anybody connected with his office about this communication of George Albers or his Seattle at-

(Testimony of L. E. Gaumaunt.) .

torney—communication by witness, prior to coming down here for the trial a week ago Thursday. The matter of calling upon George Albers, that happened in Seattle. He later saw Judge McGinn here, and saw George Albers and his attorney in Seattle. Outside of Mr. Jones he had not seen fit to advise the Government or its representatives about that, until he came down here the day of the trial. He referred to a letter that he wrote to Mr. Haney, in his letter to George Albers, wherein he stated “Mr. Heeny, the District Attorney, told me it would be either the 24th of this month or ten days later. Our chances are very good, I think. I told Mr. Heeny lots in my letter which the jury did not ask me, and I think he has another viewpoint of the case.” He never wrote the District Attorney but one letter. The one here shown him by the District Attorney. The District Attorney wrote him a reply, copy of which is here shown the witness.

Thereupon the letters just shown the witness were offered and received in evidence, marked Government’s Exhibits “A” and “B” and read as follows:

“Kent, Wash., Nov. 6, 1918.

My dear Mr. Heeny:

I have been very much worried since I came back from Portland in regards to the Albers case. I answered the questions asked me correctly, but there was other things happened which I was not asked, and I been afraid that his attorney might ask of these happenings, and I am not posted as to what I should do. You said you wanted Mr. Albers to have a fair

(Testimony of L. E. Gaumaunt.)

trial and also the Government, and that has also [114] worried me. I will now tell you of some of things that happened. Not that I want to try and save him, but save myself from any further troubles. After I heard him make the remarks about McAdoo I told him that he better keep his mouth shut and I told him I was an officer from the State of Washington, and he would get himself in trouble. Now, Mr. Heeney, don't you think he must have been pretty drunk, otherwise he would have shut his mouth? The jury asked me how drunk he was, and I think it was my place to have told them then, but Mr. Tichnor told me to answer only what I was asked. Now I am asking you to advise me. Mr. Bendixen was talking to him in the early part of the evening, and never made any remarks to anyone in regards to Albers, although he knows Tichnor, I believe. So I went in the washroom and sat down and then the party began; it was late in the eve when I went to look for the fellow who was *who was* with him who later proved to be Bendixen. I don't know whether there is any personal feelings between Bendixen or Albers, only Bendixen said he had an uncle in the firm. I also heard some people say when I was at the hotel that Tichnor said if Albers was not found guilty he would throw his star in the lake and jump in after him, but I did not let them people know who I was. These are the things I think you should know, *now* that I care for Albers in the least, and if he found guilty it is due to *you* good judgment, and I think *your* the man to know it all. If these things

(Testimony of L. E. Gaumaunt.)

I said will in any way interfere with what I said, why let me know, as I don't want to make a mess out of this. You said to tell the truth, which I am doing. But the jury did not ask [115] me about this, so I said nothing, but since that time I have worried about these things and now I feel some better. If at any time you should want to let me know about this, why this is my address. If you don't remember me by name, you will remember me by the white sweater, as you called it.

L. E. Gaumaunt,
c/o Ford Agency, Kent, Wash.

Kindly advise me as to what I should do in regards to this matter.

November 26, 1918.

Mr. L. E. Gamaunt,
c/o Ford Agency, Kent, Wash.

Sir:

Attendance upon the Court in trial has prevented an earlier reply to your letter of the 6th inst. which is hereby acknowledged.

I note what you say, and in reply have only to say that the Government expects you to tell the truth, the whole truth when you are called as a witness; neither less nor more than that will satisfy the Government or be fair to the defendant.

I cannot advise you as to when this case will be tried, but imagine it will be shortly after January first.

Respectfully,
UNITED STATES ATTORNEY.

Testimony of E. C. Bendixen, for the Government.

Thereupon E. C. BENDIXEN was called as a witness in behalf of the Government, and, being first duly sworn, testified as follows:

He is thirty-one years old. Has lived in Portland about two and one-half years. Prior to coming to Portland lived in Tacoma, Washington, about six or seven years. Prior to living at Tacoma lived at Springfield, Minnesota. He was born there. He is known as auditor and [116] inspector of the Aetna Life Insurance Company, Casualty Department. Has been engaged in that business two and one-half years. At Tacoma he was load dispatcher for the Puget Sound Light, Construction and Power Company. Prior to that he followed surveying, and also collecting for the Telephone Company. He is a married man; has two children. Was registered in the first draft. Living in Portland at that time. Registered in Portland with one of the Local Boards. Has the card yet. On the 8th of October, 1918, he was in Grants Pass most of the day until the evening, until 6:30, when he got on the train going north to Roseburg. Had been in Grants Pass that afternoon, in connection with his regular business, not for any other purpose. Was there to see a client. Got on the train for the purpose of going to Roseburg, where he had some business to attend to. He got to Roseburg. Didn't eat any dinner that evening. At the time he got on the train and prior to that time he was not acquainted with Henry Albers, L. W. Kinney, L. E. Gaumaunt, J. A. Mead, and only knew

(Testimony of E. C. Bendixen.)

Mr. Tichenor by sight. He had never met the gentleman. Did not have a bit of acquaintance with him prior to that evening. He had been sick in Grants Pass all afternoon. He had been sick for about two or three days. Had a very bad pain in his stomach and had taken a special cathartic, as they say, to try to relieve that pain, and when that train came in the first thing he was forced to do was to go into the lavatory, and as he came out this man, he didn't know who he was at the time, was sitting there, and that was the first time he saw him. Nobody at all was with him. He noticed by the smell of the room that defendant had had liquor, and he warned him as to having liquor in his possession, because he knew the [117] United States—this man Tichenor, was on the train, because he got on the train at Grants Pass. He stood at the station with witness, and he knew him just personally, that is only by sight. Yes, sir, he told Mr. Albers there was a Deputy United States Marshal on the train, and he told him if he had any liquor in his possession it would be a wise thing for him to get rid of it. Defendant looked up and he says, "No, they won't pinch me." Witness said, "They are liable to, and I think you would better take precaution." And defendant turned around to him and said, "Oh, to hell with him," and went down in his grip and pulled out a pint bottle of whiskey and offered witness a drink. He didn't have any further conversation with defendant at that time. He left the compartment or smoking-room then. Mr. Tichenor just came in and he did not want to get

(Testimony of E. C. Bendixen.)

mixed up with anything like that and he walked out of the place and into the rear observation-car. Yes, he returned a little later, and as he went into the car, just into the doorway of the little compartment, he met a friend from Spokane that had just come up from Los Angeles, and he and his friend were talking and they talked there a few minutes, and it was a little crowded around there and witness told him, "Let's go back to the rear of the observation-car and sit down and talk." So they went back there and sat down and talked. Later he returned to the smoking-room where Mr. Albers was. Fifteen or twenty minutes, or so; he could not say as to the exact time. As they were talking a gentleman came up and asked his friend if he was the gentleman that had been talking to this man in the smoking-car and his friend said no, and then he asked witness, and witness said, "Yes, I have been talking to him," [118] so he said, "Mr. Tichenor would like to see you up here. He said he would like to talk to you." Witness said, "All right." So he went up and then he met Mr. Tichenor the first time ever he met him in his life. He was introduced to him. Mr. Tichenor then spoke to witness and he said—he asked him if this man has made any remark—had made any seditious remark, and witness said, "No, not to me" and Mr. Tichenor says, "Do you know the man?" and witness said, "No, I don't know who he is," and Mr. Tichenor said, "I will tell you. He has been making some very seditious remarks and we think he is Mr. Albers, Henry Albers, of Portland," and when he

(Testimony of E. C. Bendixen.)

said that, why, witness said, "Is that so?" and they spoke on the matter just casually, so Mr. Tichenor said, "I would like to have you go in there and find out if he really is Mr. Henry Albers." Witness hesitated, because, as he told Mr. Tichenor, "That puts me in a very funny position, Mr. Tichenor. I have an uncle that is interested in that company of which he is president." Witness kind of hesitated, and Tichenor told him, reminded him, said it was his American duty to go in there, and witness didn't stop a minute after that, and he went right into the compartment there. When he was in the compartment before he didn't take any drink with Mr. Albers, and when he talked with Mr. Tichenor he had an understanding that if he went in there the chances were defendant would offer him a drink and he didn't want that brought up against him, if he should take a drink. He was very specific on that. Then he went in to Mr. Albers. As he went in he remembered, he kind of realized that it was a very serious business, and it was a grave—it was grave and he didn't lose his bearings, as you might say, and he went in there and he introduced himself; he introduced himself in German to him, because he can carry [119] on a conversation in German and he understood German. He had some conversation with defendant. Well, defendant made several remarks. Witness introduced himself and told defendant who he was, he told him he was Erwin Bendixen and his uncle was Peter Bendixen and defendant probably knew him. Defendant told witness that he did. He

(Testimony of E. C. Bendixen.)

thought this Gaumaunt offered them a drink. That is the way it was. Then witness told defendant right out, kind in a protective way,—he said, “Henry, you have been making some serious remarks to these fellows around here,” he said, “They are remarks that are going to go hard with you.” Defendant turned around in a very emphatic way and he said to witness, disregarding his warnings and everything, he said, “Once a German always a German.” He talked to defendant in German entirely. When defendant talked to witness he said it in German to witness. He said, “Einer Deutsch immer Deutsch. Ich bien Deutsch im Herz.” That is the way he put it to witness. Defendant made a remark about being an American, as he would say, on the outside. He said he was an American, outside, but, he said, in his heart he was German. He gave witness this impression. That is the impression he wanted witness to have by the words he used.

Thereupon, while said witness E. C. Bendixen was on the stand and being interrogated by the United States Attorney and giving testimony as a witness, the following proceedings were had:

Q. Just go ahead in your own way, without questions from me, and tell what conversation you had with Mr. Albers at that time, or what he said to anybody else while you were present.

Q. Well, then I told him, I said, “That is a terrible thing to say,” I said. [120]

Mr. McCOURT.—Do I understand from you that all that conversation you had with Mr. Albers was in

(Testimony of E. C. Bendixen.)

German? A. Yes, sir, it was.

Mr. McCOURT.—He spoke German and you spoke German? A. Yes, sir.

Mr. McCOURT.—We object to that as not tending to prove the allegations of the indictment. The allegations of the indictment clearly express the idea that the conversation was all in English on both sides, and it is clearly a variance between an allegation that the conversation was had in English, to offer proof that it was had in German, and for that reason we object to the witness attempting to state what was said and translate it to the jury here. It appears that nobody understood German except this man and Mr. Albers, at the time. I may say to the Court that the rule is very well established, I think, both in sedition cases and in libel cases, that a pleading, either criminal or civil, or a libel or seditious expression made in a foreign language—the pleadings must set out the words as spoken in the foreign language, accompanied by a translation, and also that the hearers understood the foreign language. It is clear that if all the conversation there was, was between Mr. Bendixen and Mr. Albers, and that was all the evidence there was here, it would be a variance.

Mr. HANEY.—Of course we have to be bound by the Court's ruling, but I don't see that there is very much in that objection. The question is whether this man did the thing that is inhibited by the statute. If he said these things, and said them to a man registered and within the draft, and the jury believe he said it with intent, I don't see what difference

[121] it meant what language it was in.

* * * * *

COURT.—This statute is generally against sedition against the United States, and the first clause of section 3 provides, “Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with the intent to interfere with the operation or success of the military or naval forces of the United States, or promote the success of its enemies.” The thing demanded is the intent to interfere with the operation or success of the military forces of the United States and the means is the making of false reports. Now, I cannot conceive that it was intended by this statute that the false reports should be made in any certain language. It may be made in English. It may be made in German. It may be made in Italian, but whatsoever language it is made in, it is false reports that come within the statute. And, again, “Whoever shall wilfully utter, print, write or publish any language intended to incite, provoke or encourage resistance to the United States.” Would therefore be publication in any language, and it is not confined to the English language. And then again, one of the other clauses of the statute is that “Whoever shall by word or act support or favor the cause of any country with which the United States is at war,” is denounced by the statute. Now that says by word or act. The Government has tried to prove that that statute has been breached by word, and it is trying to prove now that the words were spoken in the Ger-

man language, and it seems to me that the statute can be breached by the German language as well as by English or Italian, or by any other language. This is not an act for slander or libel. It would be from my understanding [122] of the law, simply an act denounced by the Government so that the Government itself will not be damaged, by word or act, during the progress of the war. Now, there are two other clauses which are covered by the counts in this indictment, and one of them is "Whoever when the United States is at war, shall wilfully cause or attempt to cause, or incite or attempt to incite, insubordination." It does not say either shall be by words spoken or by act, but it is very well understood that it may be by words spoken or uttered, and it may be by act. Anything that will cause or incite insubordination comes within the statute. And again, "Whoever shall wilfully obstruct or attempt to obstruct the recruiting or enlistment service of the United States." That is not based upon any words spoken or uttered. It is based upon the act itself. It may be by word or language spoken or uttered, it may be by written language, or it may be by the individual himself, so that whatever has that effect is a transgression of the law, and I think if these words were uttered or spoken in the German language, that the matter was said, and the meaning of what was said, may be stated by the witness, and that all comes within the purview of the statute. The Court will overrule the objection, and you may have your exception.

(Testimony of E. C. Bendixen.)

Mr. McCOURT.—In order that we may not make further objection, it goes to all Mr. Bendixen's testimony.

COURT.—As to that which was spoken in German, you may have your exception.

Mr. McCOURT.—Without specifically making it?

COURT.—Yes.

Thereupon, notwithstanding defendant's objection to testimony by the witness concerning a conversation carried on [123] in the German language, offered by the Government to sustain the charges in the indictment, the Court permitted the witness to continue and testify as follows: After witness had introduced himself, as he said, the first thing he did was to warn defendant. He told defendant he had been making some very seditious remarks to these men that were there, and witness said: "It would go hard with you after making these remarks"; "Are you sure you know what you are saying?" "Are you sure you know what you are doing?" and defendant made the remark, he said he was German, he was nothing but German, always a German. He said it didn't make any difference to him how he expressed it, you might say, and he wanted to imply—this was in German—and he told witness that on the outside, to the outside world, why, he was an American, but down in his heart he was a German, and when he made that remark, witness knew that was a very seditious remark to make, and he said to defendant, "My goodness, you don't mean that!" He said, "You don't mean to say you

(Testimony of E. C. Bendixen.)

would go to Germany and fight for the Kaiser?" Witness made that remark to him and defendant got up and he said he would go back in the morning. He says he had served the Kaiser twenty-five years and that America—he said, "I have served the Kaiser twenty-five years, and with America, shit, shit." That is just what he said to witness in German. Witness knew that much of the conversation. He didn't exactly remember. He warned defendant all the time. That is what he was doing, he was warning defendant against saying those things. Then defendant told—he raved on, you might say, and he told witness he had ten million dollars and he would spend every cent of it to lick America. Then also in this conversation he made the remark, which is a very [124] bad remark in the German language, it was the remark, "Schlach America." "Schlach America" in the German language, he takes the word "schlach" means to obliterate. It means to do anything to you against the country. When a man says "schlach" in German he means "schlach you," he is going to get you. This is witness' translation and that is the way it appears to him. Then after he saw defendant was of that character and he didn't care what remarks he had made, and would make any threat on us, witness walked out of the compartment and went back to Mr. Tichenor and told him the things that had been said and Mr. Tichenor said: "Well, he has been saying that to all these men," and Mr. Tichenor said, "There must be some more to this. Defendant has been

(Testimony of E. C. Bendixen.)

down in San Francisco and he must have been conspiring down there, making a contract or something." Then he asked witness if he would not go back and see if he could get some more—some dope, as he called it, as to contracts or something defendant had been doing down in Frisco. Witness went at once and he talked to defendant and tried to talk to him about several different things and then asked defendant if he had anything like that to do—had done anything like that, and he said no, he hadn't had anything to do like that. He said, he looked at witness, you know, out of the corner of his eye, like this, "Nein, nein." You understand that means "No, no," and he would not talk any more. During his talks with defendant, before that, there were one or two things that probably should be brought up in this case, in regard to that, after witness had introduced himself to him—why, he introduced himself in German, and defendant told him that—in German—"Du bist ein ecte Deutscher," or "You are a genuine German." Also [125] during the conversation defendant told him that his brothers were also pro-Hun. Well, he said German, which means the same thing. He didn't say pro-Hun, he said German. He said they were German. He also told witness of some trouble, he knew of some trouble or revolution which would appear in the next ten years, yes, five years, yes, to-morrow, he said. After he told witness this "nein, nein," or "no, no," then defendant told witness that he wanted to go to bed, and he went up to the porter and told the porter that he wanted

(Testimony of E. C. Bendixen.)

to go to bed; then witness went to the rear of the observation-car again. When defendant spoke about Germany winning this war he made the remark, "Wir haben Krieg gewonnen," that means, "We have won the war." He expressed himself that he was willing to go back—he was going back in the morning. He told witness he had ten million dollars and that he would spend every cent of it to whip America. Witness got off the train at Roseburg about an hour later. He reported to Mr. Tichenor what he had heard in that room and made a memorandum of it himself. He went to Marshfield from Roseburg and stayed in Marshfield, he thought, a week, and then he came on into Portland. After coming into Portland he saw Mr. Goldstein and was subpoenaed as a witness before the grand jury, and later testified before the grand jury. He was not acquainted with Mr. Albers prior to that time and never saw the man. This uncle of his tells him that he was formerly, or is now, a stockholder in the Albers Company. Witness had no personal connection with the Albers Company. Never had been employed by them and never had any business relations in the way of adjusting insurance or anything of that kind with them. He did not ask Mr. Albers as to how he intended to help Germany. [126]

The testimony thus given by the witness following defendant's objection and exception duly allowed by the Court in permitting the testimony of the witness relating to conversations carried on in the German language, were covered by defendant's said objec-

(Testimony of E. C. Bendixen.)

tion and his exception to the ruling of the Court in allowing the introduction thereof.

Upon cross-examination the witness testified: That he was not advised against his will to go in there. He did not see the impropriety of going in there. He said it put him in a peculiar position. It came into his mind the very first thing, absolutely, yes, sir, that it wasn't a very nice thing for him to be going into the room with a man who was intimately connected with his relatives in a business way. He didn't know that he thought it was improper—it was in a way a protection. The thought came to him naturally in the way of objection. It didn't come into his mind that the fact that his uncle and these people were associated in a business way would kind of throw suspicion on his story when he undertook to tell the story that he would learn from that man. It was just a thought that came over him, a natural thought of protection, because he knew his uncle was interested in the thing and it was a natural thought of protection. That is the way he would put it. The idea was this, it would certainly cause a great stir with the Albers Brothers Milling Company. It would reflect upon them, would naturally reflect upon him, and he thought of it in that light. He certainly did like his uncle very well. He knows Wesley Neppach. Wesley came to his house a couple of days after this thing happened. Had a conversation with witness in the presence of witness' wife. Oh, no, he didn't tell Wesley at that time that he [127] had fixed his uncle's stock plenty, and that he thought of tell-

(Testimony of E. C. Bendixen.)

ing Fred Jacquelin to dispose of his stock, or that he thought of telegraphing to him to do that, but had concluded that he would not do it, or that he better get rid of his stock as quick as he could. He did not say that. That was only in a way of protection. He knew that this thing was hurting Albers Brothers Milling Company, could not help but hurt them, and he told them in a way of protection. That is all he did; he didn't make any remark like counsel put it. He said to Wesley that he probably ought to telegraph to Uncle Wes. and Fred Jacquelin. Thought on account of this deal it would probably go hard with him. They didn't know anything about it. It was a way of protection. They should probably take care of their stock if they wanted to protect themselves. If they wanted to sell it, or do anything like that, but he didn't do it. He went into that room in the light of protection to Mr. Albers more than anything else. He had one or two drinks with him, yes. He did not make any arrangements to drink with him before he went in there. He said naturally Mr. Albers would ask him to have a drink, and he wanted to know Mr. Tichenor didn't get him in wrong because he took a drink. That is what he told Mr. Tichenor. Mr. Tichenor told him it didn't make any difference to him. Yes, he knew that he was violating the law when he drank that booze. No, he wasn't willing to do that to entrap defendant. He did not look at it that way at all. He went in there because when this man Gaumaunt came to him he showed him—showed them a deputy marshal's

(Testimony of E. C. Bendixen.)

badge, and when witness went to Mr. Tichenor, why, he was among detectives, and he thought this was a kind of detective game and he made up his mind right [128] then and there that probably these detectives, who were very zealous sometimes, were trying to put something over on this man, and he went in there in that light and he even talked German to him to hear what he had to say to be sure he gave him a square deal on the thing. He did that. That was his full thought when he went in there. He didn't take him and put him to bed and say: "Go to bed and keep your mouth shut, you old Dutchman, or I will put a plaster on it," because these other fellows had the goods on him, they said, and witness went to find out if true. He certainly was defendant's true protector. He gave him good protection, although he may be cussed for it. That is the size of it.

Testimony of Olga Gomes, for the Government.

Thereupon OLGA GOMES was called as a witness in behalf of the Government, and being first duly sworn, testified as follows:

She lives in San Francisco. Lived there two years. Prior to that lived in Portland all her life. She is a manicurist at the Sutter Street Barber-shop. Connected with the Sutter Hotel. She met the defendant Henry Albers twice in the barber-shop there. The first time was in the spring, around April of 1918. Had never met him before. Manicures nails. Mr. Jack O'Neill introduced her to him.

(Testimony of Olga Gomes.)

That was the first time she ever met Jack O'Neill. Mr. O'Neill wanted her to meet defendant and man-icure him. Mr. O'Neill and she talked about the peo-ple in Portland that they knew and mutual friends in Portland, also Milwaukie, Oregon, where she used to go to school. Yes, sir, that is the place where Mr. Albers had a home. Yes, sir, he spoke of his home there. She manicured Mr. Albers about one o'clock. She was supposed to leave the barber-shop to get off at one o'clock, and Mr. O'Neill told her if she would stay and manicure Mr. Albers that they would [129] take her home in a taxicab, because she had a luncheon engagement at her home at about a quar-ter to two. While she manicured Mr. Albers they talked about mutual friends they had in Milwaukie. She went to school in Milwaukie when she was a young girl. Graduated there from the Milwaukie school and they both happened to know several peo-ple there, namely, Mr. Streib, Miss Lizzie Streib and Ruth Luchler. The defendant was telling her that he bought some property from Miss Ruth Luchler's mother and he was telling her he paid so much down on the home and he was paying her fifty dollars a month so that Miss Luchler's mother could go back and live with her in New York, or some place in the east; and he spoke about how he was going to fix up this little place and told her about some China pheas-ants he had and was taming, and how much pleasure he got out of these China pheasants. As they were talking, having this conversation about different people out in Milwaukie somebody picked up the

(Testimony of Olga Gomes.)

paper and started to read something about the war. Something was mentioned about the war there and Mr. Albers changed right away. Changed his line of conversation and started to—one thing she remembered, he stated very distinctly that he was a Kaiser man from head to foot. When he said that she started to—she didn't like to see him talking about the war, so she tried to change the subject, but he went on talking. She didn't remember the distinct remarks that he said in the proper shape because she didn't like to hear him talking about that, so she tried to change the subject and talk about these people again in Milwaukie. Nobody heard it but witness. He just addressed himself to her. He was very much in favor of Germany. The only distinct remark she remembered him making in the proper shape [130] was that he was a Kaiser's man from head to foot. They left in about half an hour after she started to manicure him. Mr. O'Neill and another lady went out with them; thought her name was Miss Wade. Didn't hardly remember. They met her up on Post Street. They said they would take her home and on the way up there they asked her to go out for a little ride with them. They had planned a little ride for the afternoon and they induced her to go on this little ride with them. She didn't think there would be any harm, so she said yes. After she had manicured Mr. Albers he went into the bar for a minute, or a few minutes. She could not say what condition he was in when he came out of the bar, but he was walking very straight. That she observed.

(Testimony of Olga Gomes.)

No outsiders would know he had been drinking. When they got into the cab they rode right up Sutter, then on to Post. She was sitting alongside Mr. Albers in the taxicab. Mr. Jack O'Neill was with this Miss Wade on the two little seats. It must have been around two o'clock. After getting Miss Wade they rode out on the Highway as far as the Stanford University, then they turned around, rode through the Stanford grounds, then rode around and came back. Stanford University is at Palo Alto. Didn't know how many miles from San Francisco. They didn't stop off any place on their way to Stanford University. Remembered defendant making the remark, she remembered it so well because it impressed her so at the time, he said that, "I am a millionaire and I will spend every cent that I have to help Germany win the war," and then he pounded on his knee and made this remark in German, "Deutschland über alles," and just as he made that remark—well, they were approaching the grounds there, and Miss Wade said, "I wish you would shut up, because we might [131] all be interned," and then he said, "I don't care; I am a spy; I am a spy and I am ready to be shot right now for Germany"; and another remark she remembered very distinctly was, "There will be a revolution in the United States." He said the Kaiser was the smartest man in the world and that the President didn't have any brains. The only effort to restrain defendant from further conversation was that made by Miss Wade. After leaving Stanford University they came di-

(Testimony of Olga Gomes.)

rectly home over another route. She didn't know the name of the highway; didn't remember. He took her right home, where she arrived somewhere around six o'clock. Did not stop off at any place on their way back. There was lots of conversation but she did not remember it all. Just remembered these remarks, because it impressed her so that she could never forget them. They made her so mad and she felt like fighting, but could not, being a guest. They worried her for a long time, for quite awhile. They worried her very much that night; she could hardly sleep. They worried her so much she didn't know what to do about it herself, so she confided in one of her customers and asked him what he thought about it and he said, "Why, report it right away, by all means." He said, "If you don't I will," so to save her the trouble he says, "I will do it to save you the embarrassment of going down there," he says, "I will do it for you," so he did it for her. Reported to the United States Attorney in San Francisco about two weeks later, and this took place some time in April, 1918.

On cross-examination the witness testified she never saw Mr. Albers before in her life. She lived in Milwaukee as a girl; was reared there. She married in Portland. Is not married now. Her husband is not dead, [132] but divorced. She is a manicurist living in San Francisco. Does not know Mr. Albers' sister. Is not of German ancestry. Is Russian. Her father and mother were born in Russia. She was brought up in Milwaukee. Understands one or

(Testimony of Olga Gomes.)

two words of German. Her folks as long as she can remember always spoke English. The language she first learned was English. Her father and mother spoke English at home. Has two brothers and three sisters. She is the fourth of five children. The only language that was spoken in their home was English. Her mother and father were born in Russia. They were Russians. They spoke Russian. They were born in a part of the country where she was told they called it low German or something. They spoke partly Russian and partly German. She had talked a good deal to Mr. Goldstein about this case. A good many times. Could not say the exact number. Didn't stop to count. Could not say whether five times, six times, seven times, ten times. Mr. Goldstein is the attorney. Talked this case over with her all of these ten times, yes, sir. To keep it refreshed in her memory, she supposed. Her maiden name was Olga Drefs. Mr. Albers was not asleep all the time when out on this ride. He dozed off once or twice. No, she would not say he was drunk, because he talked intelligently on different subjects suggested about these people in Milwaukie, and all that. Didn't know he had been on a protracted spree for fifteen or twenty days at that time. She never talked to anybody in the barber-shop about Henry Albers. Didn't at that time; did afterwards. Yes, she heard he was a man who went off on periodical sprees. Heard that afterwards from Mr. O'Neill. She didn't hear that he had ten million dollars. He told her that he was a millionaire.

(Testimony of Olga Gomes.)

Didn't know whether he was. She had heard of the firm so many years and it seemed to her [133] she had always heard they were millionaires. Thought they were millionaires. Never heard they commenced here as poor boys and that they are doing business here on money largely that the banks furnish them until she came down here. Read it in the papers, she thought. Somebody told her the same thing.

Testimony of Henry Cerrano, for the Government.

Thereupon HENRY CERRANO was called as a witness on behalf of the Government, and, being first duly sworn, testified as follows:

He lives at 210½ Montgomery street, city of Portland. Has lived in Portland eleven years. Is a married man; has got a little girl. Born 1879 in Italy. Is a naturalized citizen. Was naturalized January 2, 1915. His father was an Italian. His mother was a French woman. His occupation is that of janitor, cleaning windows. Knows the defendant, Henry Albers. Has been cleaning windows about four years for Albers Brothers. Recalled hearing Mr. Albers make a statement concerning the war. That was before October, 1915.

Thereupon defendant interposed an objection to the introduction of testimony of the witness concerning statements alleged to have been made by the defendant before October, 1915, as follows:

Mr. McCOURT.—I object, your Honor, to any statements back that far as not tending in any way

(Testimony of Henry Cerrano.)

to establish any issue in this case. The question, and the only question that can come up when other statements are offered is the one of intent, and there can be no such intent as is involved in this case existing or arising at that particular time, and consequently [134] any statement that was made at that time would have no tendency whatever to show that Henry Albers had an intent that was impossible to exist at that time when he should have made the statement—at that particular time. Besides that we object for the reason that it is too remote.

Respecting the objection thus interposed the Court made the following statement and ruling:

COURT.—I think it is perfectly competent, not to show the defendant was guilty of the offense charged in the indictment, but for the purpose of showing the intent in the defendant's mind, and in that way assist the jury in determining the intent of the defendant in doing what he is charged with doing. For that reason the Court will overrule the objection and allow this to go to the jury.

Defendant duly excepted to the ruling of the Court, which exception was duly allowed by the Court.

Thereupon counsel for the defendant made the following statement:

Mr. McCOURT.— * * * We have never doubted that this man was strongly pro-German before we entered the war. There will be no dispute about that here.

(Testimony of Henry Cerrano.)

Thereupon the attorney for the Government made the following statement:

Mr. GOLDSTEIN.—With the understanding that this testimony is offered to prove intent, and for that purpose only.

Thereupon the Court permitted the witness to give the testimony sought to be elicited by the Government, and said witness continued to testify as follows: No, it was before October. He didn't know exactly which month. It was before October, because in the month of October he quit washing windows for Mr. Albers. He could not exactly remember the time it [135] was before October. He was just cleaning the windows in the office of the Albers Brothers Milling Company. He saw the defendant Henry Albers there in the office. Well, he saw Mr. Albers once. He came in the office with a German-American paper and he gave this paper to a young gentleman who was working at a typewriter machine and giving this paper he says: "Look at that paper. See what the German army is doing. The German army is doing wonderful and France and England come very easy." And then Mr. Albers went away from that room and the only words I heard after that, I heard these two words: "One Kaiser and one God." He didn't understand well what defendant said before, if we were to have one Kaiser and one God, but he is sure of the statement, "One Kaiser and one God." He heard very well them two words.

On cross-examination the witness testified that he

(Testimony of Henry Cerrano.)

told this to nobody. About twelve people worked in the office. He didn't know when Italy went into the war against Germany and Austria. Didn't pay any attention to that. Yes, sir, he knew Italy was lined up with Austria and Germany in a treaty alliance and that Italy left this alliance and went to the allies. He is an American citizen, is very strong for the United States. He never told anybody about this except Mr. Rutto. He is the landlord of the hotel where witness lives. He is an Italian. He died in January, 1917, three or four months before America entered into the war. All he remembered, the same day, when his day's work was all over, he went home and spoke to Mr. Rutto. He said, "Mr. Rutto, I heard this and this in Albers' office," and Mr. Rutto say, "Certainly the Albers Brothers are very pro-German, because they are German themselves." That was the first time witness knew the Albers [136] Brothers were Germans.

Thereupon the Court confirmed its allowance of an exception to the ruling of the Court denying and overruling defendant's objection to the testimony of the witness Henry Cerrano.

Testimony of N. F. Titus, for the Government.

Thereupon N. F. TITUS was called as a witness in behalf of the Government and, being first duly sworn, testified:

That he lived in Portland twelve years, prior to which he lived in San Francisco, where he was born. He is now in the water transportation almost exclu-

(Testimony of N. F. Titus.)

sively. He is a married man and has a family. At the present time he is with the Spruce Production Division of the United States Army, where he has been employed seven months. Prior to that he was employed by the Columbia Navigation Company and prior to that by the Elmore Company of Astoria. He has his headquarters and business office on Albers Dock No. 3, adjoining the mill of the Albers Brothers right next to and immediately north of the Broadway bridge. He has been there between three and four years. Has known Henry Albers personally about three years, possibly more. Has seen him very frequently. He saw a great deal of Mr. Albers all during the year of 1917 and the early part of 1918, up until approximately March 1st, possibly a little later. In January and February, 1918, the schooner "Oakland," belonging to Mr. Albers, was moored at the Albers' dock No. 2 and she was being outfitted and Mr. Albers was around a great deal of the time that he was being fitted out, and his office being located there, why, he saw a great deal of defendant. Yes, he had conversations with Mr. Albers during the year 1917 and [137] covering a considerable portion of the year. These conversations occurred on the Albers dock this city. To the best of his recollection they commenced in about January—either January or February, 1917. He had conversations with him concerning the great war.

Thereupon the witness was asked the following questions by counsel for the Government:

Q. I wish you would tell the jury, fixing the time

(Testimony of N. F. Titus.)

as best you can, when you had conversations with Mr. Albers concerning the war, if any, and what he said.

Thereupon defendant interposed an objection to said question for the reason that the same was incompetent, irrelevant and immaterial.

The Court thereupon propounded the inquiry to counsel for the Government:

COURT.—Is the purpose of this evidence of this witness at the present time to show the bent of the defendant's mind?

To which inquiry counsel for the Government replied:

Mr. GOLDSTEIN.—Exactly; as to anything that might have been said before the Espionage Act was passed.

Thereupon the Court ruled as follows upon defendant's objection to the testimony sought to be elicited from said witness by the Government:

COURT.—With that understanding the objection will be overruled.

Thereupon the following colloquy between counsel for defendant, counsel for the Government and the Court ensued: [138]

Mr. McCOURT.—May I ask whether or not the proof is directed at this time to the last three counts or to the first four counts in this line of examination?

Mr. GOLDSTEIN.—Naturally the testimony given as prior to June 15 would be for the purpose of proving the intent with which the utterances of the first four counts were made, but as to anything that

(Testimony of N. F. Titus.)

was said after June 15, 1917, it would go to prove the exact charges in counts 5, 6, and 7 of the indictment.

COURT.—Very well, with that understanding you may proceed with this testimony.

Mr. McCOURT.—We wish our exception to the Court's ruling but would like to have it understood that we object now to the direction that is being given the testimony for the reason that it is incompetent, irrelevant to prove intent, being prior to the time an intent of the crime could arise. It is the same objection we made to a former witness' testimony.

The Court thereupon overruled defendant's said objection, to which ruling defendant duly excepted and defendant's exception was allowed by the Court.

At the time of making the last mentioned ruling the Court made the following observation, assented to by the Government:

COURT.—As I understand it, this testimony is offered for the purpose of proving the intent of the defendant.

Thereupon the witness was asked the following question by counsel for the Government: [139]

Q. Now, Mr. Titus, what conversation did you have with Mr. Albers concerning the war, commencing about January or February, 1917, and running up to June 15, 1917?

Thereupon counsel for defendant inquired whether defendant's objection and exception would go to all the testimony sought to be elicited by the foregoing question, and was answered by the Court in the affirmative.

(Testimony of N. F. Titus.)

Thereupon the Court permitted the witness to answer the question, and, continuing, the witness testified: That the conversations he had with Mr. Albers were numerous and he was unable to fix any definite day during that entire period when any particular conversation took place. He recalled very distinctly the nature and substance of the conversations, and to begin with, the first point that came to the mind of witness was the discussion of Belgium and other atrocities, this topic arising from the current newspaper comments. In discussing those features, that particular point with Mr. Albers, he uniformly made the statement that they were all lies and that the reason they got them in that shape was that the press of America was dominated by the English press, and that if we wished to get the truth of the situation we should read the German newspapers. He further discussed the trouble that the United States was having with Germany, the Imperial Government of Germany, respecting the various points at issue at that time, the exchange of notes which followed—and he believed—stated himself that the United States was misled in their position and the fact that they were misled was due to the influence of the British press [140] and on numerous occasions emphasizing that point. Defendant frequently discussed the conditions in Germany, his visits over there, his great liking for the condition of living in Germany, the fact that the people there enjoyed life better than they do over here, and in discussing the life in Germany he frequently mentioned, or made comparisons between

(Testimony of N. F. Titus.)

the institutions in this country and the institutions in Germany, laying particular emphasis on our forms of municipal government, speaking of our State Government—its efficiency, etc., and in comparison of the national forms of government, and in every particular case in these comparisons emphasizing the point that he liked the form of government in Germany better than he did over here, feeling that the forms of government here were maybe swayed by party action, political action, and selfish ends and that the German forms of government were more efficiently and more ably and more conscientiously administered. That occurred along the first part of the year 1917 on numerous occasions. Defendant frequently mentioned at that time that the people in Germany enjoyed life more than they did over here. Well, the first thought that occurred to the mind of witness the first time defendant mentioned that was that he spoke of the convivial spirit of the people over there. He said they would go to a church on Sunday morning. After church they could meet around at a little beer garden and sit around and play games and have a good time and he felt that the people there enjoyed life more than they did here. It was impossible, witness said, for him to tell whether these conversations took place in April, May, June or July, but the [141] subject was up a number of times and defendant reverted back to the old primary consideration that defendant believed that we in this country was dominated by the British press. That seemed to be a particular hobby of his and he con-

(Testimony of N. F. Titus.)

stantly referred to it and reverted to it, stating that we were misled by the British press and he felt that we were not justified in going to the length that we did in actually entering the war.

Thereupon the witness was asked the following question by counsel for the Government:

Q. Mr. Titus, you were about to fix a date wherein a certain conversation with Mr. Albers concerning the ability of the United States to cope with Germany occurred and you said that you could not fix the exact date, but by associating it with some incidents you could approximate the date. Will you proceed now?

Whereupon, the witness having started to answer the question last propounded, saying: "The method by which I associate it is this," he was interrupted by counsel for defendant, and the following colloquy between counsel for defendant and Court occurred:

Mr. McCOURT.—Our objection and exception goes to this question, your Honor?

COURT.—Yes, you may have your objection and exception.

Mr. McCOURT.—And to all similar testimony.

COURT.—Yes.

Thereupon the witness continued and testified: His permanent office on Albers Dock No. 3 is on the lower dock. During the summer months and occasionally during the winter months the river rises to such a stage it is necessary to move to the [142] upper dock occupying the old office of the American Hawaiian Steamship Company, and he had his

(Testimony of N. F. Titus.)

quarters in that office during the month of June and up to the 20th day of July, approximately seven weeks. While he was in that office occupying that quarters Mr. Albers on several occasions dropped in and had conversations with him. And his distinct recollection was that this was one of the topics that he discussed during that period. The conversation arose from a discussion of preparedness of the United States, or, rather the unpreparedness of the United States as contrasted with the preparedness of European countries—the fact that they had long maintained standing armies and in this further that the youth of those countries had been put through a compulsory term of military service, and Mr. Albers, commenting on that, drew the comparison that our soldiers were really amateurs going up against professionals in this war and he doubted under the circumstances if we could beat the German army in a thousand years. This conversation took place either during June or July but his honest belief was that it took place during July. As he recalled the conversation at that time, the day was very hot and it was well on into summer. He had further conversations after that date, both in that office and when he returned to the lower dock to his former office. He returned about the 20th of July to his former office, where he continued to have conversations with Mr. Albers. It was difficult for him to fix the date because during the entire period from July 20 on to March 1, 1918, a period of seven months, he [143] could not recall, had nothing to associate the

(Testimony of N. F. Titus.)

conversation by, like he had moving to the upper dock. He knew though that he had a number of conversations. Whether they took place in August or September or December he could not recall at this time. But he recalled he had a number of conversations. He expressed it as his honest belief that they went over the same conversations several times and these same points that he had testified to occurred in the fall of that year and in the spring of the year 1918. The witness testified he could distinctly recall that after July 20, 1917, mention was made of the fact that we were dominated by the opinions advanced by the British press and that the stories of the Belgium atrocities and similar occurrences were lies. He further advanced the statement that if we wished to get the truth we should read the German papers. This was the topic that came up on several occasions. He did not recall it happening on this so-called hot day in July but did recall distinctly that it was after the war—after we went into the war. They might have been all the same conversation, they might have been different. He had so many conversations it was difficult for him to identify any particular one now. As a matter of fact Mr. Albers' visit in his office sometimes covered a period of 2 hours and during the course of 2 hours they discussed a great many things, so that he would say that a great many of those conversations embraced several of these topics. His recollection on this conversation about the armed forces of the United States was to the effect that there was a gentleman present. He

(Testimony of N. F. Titus.)

felt that in this [144] particular case he could recall in his office there were two chairs there, Mr. Albers occupied his chair, another party occupied another chair and witness stood against the wall desk. Witness came back from lunch and found these two gentlemen sitting there and stood against this wall desk and listened there. Witness stated that his recollection was that this conversation took place at this particular time and the conversation terminated by Mr. Albers asking him if he wished his chair. They had been conversing some time and witness told defendant yes, that he needed his chair, he had to go to work. So in that way witness felt that he could associate this particular conversation. The other person present, as he recalled it, was a man by the name of Smith who is now in the United States army. After July of 1917, he could not fix the exact date, but he remembered that they did discuss the United States Food Administration. They were discussing the various rules and regulations.

Thereupon counsel for defendant addressed the Court concerning defendant's objection and exception to the line of testimony being given by the witness as follows:

Mr. McGINN.—Our exception goes to this all, your Honor, I suppose.

COURT.—Yes.

The witness, continuing, testified: The matter of substitutes etc., and Mr. Albers advanced the idea that the Food Administration was outrageously and ridiculously conducted or organized. The point he

(Testimony of N. F. Titus.)

made was this, that the men in charge were not food people and in order to get expert [145] assistance or to form an advisory board they would have to bring together some of the larger eastern food manufacturers or dealers in food products and on that account these men in giving their advice would probably be led by selfish ends and in the end the inexperienced man in charge of the Food Administration would be led to acts that would rebound to the benefit of the food manufacturers or food brokers in the east and that on that account the Administration would not be properly or conscientiously administered along the lines that it was intended. The discussion concerning a revolution in this country seemed to be quite a hobby of Mr. Albers. He mentioned that on several occasions. The witness recalled that he mentioned it after July 20, 1917. He believed the last time that defendant mentioned that was during the winter of 1917-18. Defendant made the statement that he felt that we were on a verge of revolution; in other words, that we were living on a volcano and disturbances of a violent nature might break forth at any time. No, he could not specifically state that any discussion was had between himself and Mr. Albers about the Kaiser or our ability to overcome the Kaiser. The conversation about overcoming him took place in the office upstairs that he mentioned during June and July, mentioned the success of our armed forces. Witness expressed the belief that there were other conversations but he could not swear to it at this time. Witness stated

(Testimony of N. F. Titus.)

that candidly his recollection was that the discussion wherein the justification of America's entrance into the war was discussed by Mr. Albers took place [146] in the upper office, the American Hawaiian office, during the last of June or the first part of July. The discussion at that time reverted simply to the old topic of the domination of the English press and he stated he felt that we were not justified in entering the war. We were misled by the British propaganda. The witness testified he was forty years of age October 24, 1918. He registered in the draft and is not yet classified. That his recollection was that these conversations with Mr. Albers ceased about March 1, 1918. The witness stated that his recollection on that score was that during the months of January, February, 1918 defendant was outfitting the schooner "Oakland" at the adjoining dock Albers dock No. 2 and after the schooner "Oakland" was outfitted he saw very little of Mr. Albers. Witness further fixed the date by his efforts to dispose of a coil of rope that a friend had left with him to Mr. Albers, which coil of rope witness dispatched to Newport for use in connection with a wrecked vessel on March 2, 1918. The witness was not cross-examined.

Testimony of G. M. Wardell, for the Government.

Thereupon G. M. WARDELL was called as a witness in behalf of the Government, and, being first duly sworn, testified as follows:

He has lived in Woodlawn, Portland, a little over

(Testimony of G. M. Wardell.)

a year, was 36 years old the 29th of last August. Registered for the first draft. Is a married man with a family, wife and 3 children. He is in class A-1. He knows the defendant Mr. Albers. The first time he ever saw Mr. Albers to know him was over at Wheeler in Tillamook County, on the West coast of Oregon. Witness was over there for the District Attorney of Tillamok County, making some investigations over there on the illegal sales of liquor. [147] He was employed as a special investigator. When he saw defendant he was at a place called Oscar Carlson's over at Wheeler. It formerly was a saloon but it was a soft drink and box alley there—something. Mr. Albers was in there playing box-ball and witness was in there and the papers came in off the train and there was some remark, something in the papers about the blowing up of the ship by one of the German submarines and Mr. Albers made the remark that when the Germans got well organized that with the submarines there would be no chance for any boats to go across and that—in substance, he thought defendant said that he hoped they would blow every British ship out of the water. He wasn't absolutely sure as to the date when this conversation took place. It was some time between now and the middle part of February of 1918; if he wasn't mistaken about the middle of February, 1918. Witness was just recovering from a illness.

On cross-examination the witness testified that he was collector at the present time. Worked for the

(Testimony of G. M. Wardell.)

Eilers people up to a short time ago, collecting installments. He was over in Tillamook as a special investigator. That means a detective. He was a detective for a while. At that time he had been working off and on, every once in awhile he would get a job of that *time* and he *had* would do it. He was working independent at that time. He was an independent detective. Didn't take divorce cases. He had looked up soft drink places to find out whether there was any booze in them. Was paid by the county and by the sheriffs. He hadn't done work for the anti-Saloon League for a good many years. Yes, he had worked for them as a detective, investigating. He didn't make his living that way. He didn't report his conversation with [148] Mr. Albers to anyone in particular. They found it out in some way and Mr. Watkins came out to see him about it. Elton Watkins. He is associated with the Secret Service Department of the United States Government. Witness didn't know how Mr. Watkins found it out. Came out to see him at his home on East 10th North about 10 days ago. He didn't write the conversation out at the time. He guessed he had told somebody about it before he told Mr. Watkins. He didn't remember, but made the remark to somebody—Oh, a long time ago. Guessed that he heard those remarks. He recalled that he heard Mr. Albers say over there at Tillamook he hoped the submarine warfare would blow every British vessel out of the water. That was the substance of it and he remembered that and told Mr.

(Testimony of G. M. Wardell.)

Watkins that. Mr. Albers was over there in the interest of a boat that they had over there trying to get it off the ways.

Testimony of David McKinnon, for the Government.

Thereupon DAVID McKINNON was called as a witness in behalf of the Government, and, being first duly sworn, testified as follows:

At the present time he lives in Portland. Has lived there about four months. Prior thereto he lived in San Francisco. All his life, all but four months. At present he is superintendent of construction of the Standifer Steel Company in the city of Vancouver, where he has been employed four months. He knows the defendant Henry Albers, somewhat. Met him, should say about eight years ago in Portland. Witness was travelling through Portland, that is, travelling throughout the coast then for the American Smelting and Refining Company, with which he was employed in the capacity of engineer and salesman. In that capacity he met Henry Albers and became [149] somewhat acquainted with him. He met defendant in San Francisco after the world war and had the discussion concerning the war. Witness fixed the time at about two or three months after the war first started. In September, or October, or November, 1914, somewhere in that locality. There were standing at the corner of Sansome and California Streets at the time this conversation took place. Witness was looking at a new building under course of construc-

(Testimony of David McKinnon.)

tion. Defendant happened to come up unexpected and started talking with witness where he was standing. Defendant accosted witness. Witness didn't see defendant.

Thereupon counsel for Government asked the witness the following question:

Q. Just state the conversation that took place concerning the war.

Thereupon defendant interposed the following objection:

Mr. McCOURT.—The defendant objects to the testimony sought to be elicited from the witness for the reason that it is of a time long prior to the entry of the United States into the war and under circumstances entirely different from the circumstances under which the allegations in the indictment, or the charges in the indictment, or the statements in the indictments, are said to have been made. Therefore it is immaterial and also too remote.

Thereupon ensued argument by counsel, after which the Court ruled upon defendant's objection as last interposed and in connection with his said ruling instructed the jury as follows:

COURT.—This testimony is offered, not to prove the acts [150] that are alleged against him constituting the offense, but to prove or to show, if the testimony has that effect, the intent or not the intent but the bent of the defendant's mind or his attitude towards this country and towards that of Germany, and it will only be admitted for that purpose and none other, and it is admitted bearing upon in-

(Testimony of David McKinnon.)

tent so that the jury is put into possession of the bent of mind or of the attitude of the defendant prior to the time when these acts are alleged to have been committed, to enable them better to say what his intent was and by considering all the testimony in the case, and I will admit it for that purpose. I will say to the jury now that this testimony is not admitted for the purpose of proving the allegations in the indictment or any of them by which this defendant is charged with the offenses therein stated, but it is admitted for this purpose and this purpose only as tending to show the bent of mind of the defendant or his attitude towards this country as compared with his bent of mind and attitude towards the Imperial Government of Germany, and is for the purpose of aiding you, taking it in connection with all the testimony that will be offered in the case, to determine what his intent was if it be proven that he has made the statements which it is declared by the indictment he has made, and by taking this in connection with all the testimony in the case it will aid you in determining what his intent was in making such remarks or in making such statements as may be proven to your satisfaction beyond a reasonable doubt.

Thereupon the defendant duly and regularly excepted to the action of the Court in overruling defendant's objection to the testimony sought to be elicited by the question last [151] propounded to the witness by counsel for the Government, and also saved an exception to the Court's instructions to the jury concerning the effect of the testimony and its pur-

(Testimony of David McKinnon.)

pose, which said exceptions were duly allowed by the Court.

Thereupon the Court permitted the witness to give the testimony sought to be adduced by the Government, and, continuing, the witness testified: Well, at the time he was looking at the building that was under construction when Henry Albers happened to come up unexpected and he passed a remark asking witness what he thought of the building. Well, they passed a few little pros and cons regarding it when the subject—well, defendant mentioned his views, witness mentioned his. Then defendant brought up the subject of the war, asking witness what he thought of the war. So witness told him that he didn't want to have much to say about it, that it was something that he was very sorry it had to happen, and furthermore he thought it was too bad at this stage of the game, at this present time, that we could not settle our national disputes in other ways beside bloodshed. Then Henry Albers says to witness, "What do you think of our British cousins?" Witness said, "No British cousins of mine; nothing of British who are cousins of mine."

Defendant then said "Never mind; before we get through with them, we will kill every man, woman, and child in England." The witness then testified that he said to defendant, "Henry, you have said enough about the war to me; don't ever mention war to me again." Witness had seen defendant since that time but never talked to him. He was sure defendant used the word "we will kill every man,

(Testimony of David McKinnon.)

woman and child." He didn't report this [152] utterance of Mr. Albers to any Government officials until we went into the war. He has a wife and child of his own and felt defendant would do the same in that regard. He reported the matter to Casper Onbaum, Assistant District Attorney in San Francisco.

On cross-examination the witness testified he knew Mr. Albers prior to this conversation with him, off and on for eight years. The conversation took place in 1914 and he had known defendant about three years before that. Had never worked for him. He knew him through Jack O'Neill, who introduced them. Witness was working for the American Smelting and Refining Company. He reported the conversation after the war, he said, as he had a wife and child of his own. He didn't want the same thing to happen to his wife and child that was going to happen to Great Britain. He thought defendant was partly responsible after he made that remark; sure, yes, sir. He felt strongly against Mr. Albers, as he is American born and has been American all his life. He thought that was a very unmanly remark for a supposed-to-be American to make. Witness' ancestry is Irish and English-Scotch. His father came from Montrose, his mother from Ireland. He is more Christian Scientist than anything. His father was Presbyterian, his mother Catholic. He was brought up a Catholic. Knows Jack O'Neill only just meeting him casually on his trips through Portland. He thought it his duty as an American to report this conversation. He didn't report it before

(Testimony of David McKinnon.)

America went into the war; not until after America went into the war. About three years after. It stuck in his craw ever since. He reported it because he had a wife and child of his own. They could kill him but he didn't want to see his wife and child [153] killed. No, he didn't think the German people as a people had been bereft of reason and that they didn't like their wives and children. He always thought better of them. Witness testified that he understood the English and the Germans became cousins through royalty. Mr. Watkins came to see him at his home, 711 Glisan Street. He didn't know who told Mr. Watkins about it. He had no feelings against this man.

Thereupon the Government rested.

Testimony of Wesley Nippolt, for Defendant.

Thereupon WESLEY NIPPOLT was called as a witness in behalf of the defendant, and being first duly sworn, testified as follows:

He is a millwright. Has been working up at Cheney. Came here under subpoena. Knows Erwin C. Bendixen. Has known him since he was a little kid. Knows his father and his uncle. On or about the 10th day of October, 1918, at the home of Mr. and Mrs. Bendixen, in this city, county and State, Mr. Bendixen stated these facts to witness: "I have fixed my uncle's stock plenty. You know Fred Jacquelin. Tell Jacquelin to get rid of his stock, for it won't be worth much for a very great while longer," or words to that effect. And at that

(Testimony of Wesley Nippolt.)

time Mr. Bendixen said to witness that he considered the entrapping of Henry Albers in this case as his bit towards the war, or words to that effect. Mr. Bendixen said at that time that before he would go into the room where Henry Albers was that he had an agreement with Mr. Tichenor, Deputy Marshal, by which he could drink as much whiskey as he wanted to without being charged with any criminal offense.

On cross-examination witness testified that his home is in Tacoma. He was born in Minnesota. Had lived on the [154] West Coast thirteen years. He was not related to Mr. Bendixen in any manner. He is a brother-in-law of Peter Bendixen, uncle of Erwin Bendixen. He was at the home of Erwin Bendixen in Portland somewheres around the 10th of October. He was visiting there. He was at work here in the city and used to go up there and visit. He guessed Mrs. Bendixen was present when Mr. Bendixen made that statement. The three of them was about all, he guessed. He was there several hours. He just stopped in that day to call and had no other business that took him there. He saw Erwin Bendixen off and on. He had been on the road quite a while and witness had not seen him for a couple of months before that. He told Mr. Jacquelin and wife in Tacoma when he went home that he heard this statement. Mr. Jacquelin is a brother-in-law of witness and lives in Seattle. He is a stockholder in the company. Didn't think he told anybody else. First knew he was going to be brought

(Testimony of Wesley Nippolt.)

down here as a witness about a week ago last Saturday. He was subpoenaed and came here last Wednesday morning, when he went to the hotel. Did not go to Bendixen's. Has not been there this trip. He saw Mr. Bendixen here last Saturday morning outside of the courtroom and saw him this morning. He saw Mr. Albers and Mr. McGinn, his counsel, since he came down this trip before he saw Mr. Bendixen. He did not know what he was expected to testify and don't know now. He had no arrangement about the pay he should receive as a witness. He said he would pay his expenses, so he would not be anything out by waiting for the trial; Mr. Albers did. That would include such sums as he was earning. He was earning eight dollars a day. His expenses would be hardly five dollars a day. No, he had no agreement whatever, only defendant said he would [155] see witness would not lose anything because it was hard for him to get away from Cheney.

Testimony of Lot Q. Swetland, for Defendant.

Thereupon LOT Q. SWETLAND was called as a witness in behalf of defendant, and being first duly sworn, testified as follows:

His father's name was Edwin P. Swetland and was the founder of the Swetland candy establishment in this city, known as Swetland's. Witness is connected with the Perkins hotel and with the Swetland building on the opposite side of the street. He came to Portland in 1885. He was County Clerk from 1900 to 1902. Both he and his father were born

(Testimony of Lot Q. Swetland.)

in Springfield, Massachusetts. He does not belong to any German society, but belongs to the Sons of the American Revolution. He is an American on both his father's and mother's side, two hundred and fifty years back. They were New Englanders. He knows nothing but America. Has no traditions in the family except American traditions. He knows Henry Albers. Witness spends part of the winters in California. His wife is now there and he is simply here to attend this trial as a witness. He saw Henry Albers on or about the 7th of October, when he was crossing the ferry from San Francisco to Oakland to take the Oregon bound train. Thought defendant was perfectly sober then. Saw him after he got on the train in the observation-car. He was sober then. He was sober as late as witness saw him that night. The following afternoon when the witness next saw the defendant his condition had changed. He thought it was around about four o'clock he saw defendant. At that time he was intoxicated. So intoxicated that he could hardly recognize witness. Could barely recognize him. Witness attempted to talk to defendant at that time, and then withdrew, seeing defendant did not know who witness was. About an hour and a half [156] or two hours afterwards, in the washroom of the composite car, witness again saw defendant. At that time he should say defendant was drunk—intoxicated. Witness saw defendant again after he had dinner that night. Defendant's condition was the same as when witness had seen him before, or even

(Testimony of Lot Q. Swetland.)

more so. Witness did not know Mr. Albers very well, is not intimately acquainted with him and never had seen him when he was on one of hissprees. Witness saw defendant the following morning when he landed in Portland. Witness had heard about these remarks that defendant is said to have made. He did not hear any of them. He did not put defendant to bed that night.

On cross-examination the witness testified he had known Albers for several years past, just in a casual, passing way. He had not been intimately acquainted with him. They do not visit each other. Saw Albers on the ferry on the night that he crossed the ferry at San Francisco to go to the train, and saw him on the train that night. Did not observe anything wrong with him that night. Nothing of intoxication. Witness did not know defendant had the wherewith with him. He discovered that the next afternoon, about four o'clock, when he talked to defendant. He had a conversation with defendant that first evening, just before he retired, along about midnight, or a little before. Defendant did not produce a bottle and pass it around. Not in the presence of witness. Thought it was the next afternoon about four o'clock that he next saw Albers. He was sitting in his berth at that time. Witness did not know what time defendant got up, but thought he was intoxicated then. Yes, sir, he stopped and attempted to talk with him then. Defendant was asleep and *defendant* touched him on the shoulder. That wasn't the time defendant asked him to have a

(Testimony of Lot Q. Swetland.)

drink. Defendant just [157] kind of spoke in a maudlin way and witness left him. He next saw defendant about an hour and a half or two hours later, in the washroom, the smoking compartment of that car. Defendant was alone. That was the time defendant asked witness to have a drink. Later on witness saw defendant engaged in conversation in the washroom. Two or three hours after the first time witness saw him. That would make it after dinner-time. The train was about Ashland at the time. Witness ate at Ashland, at the station, where they had a twenty-minute stop. Some time after that he again noticed Mr. Albers in the washroom in conversation. When witness looked he just pulled the curtain aside and there were two or three gentlemen around defendant and all witness could see was just a little part of defendant's face and defendant did not recognize him and he withdrew. Witness just looked in because he knew defendant was there when witness was last there, and he looked in to see if defendant was in there and he was in conversation with two or three gentlemen at that time. Witness did not hear any of the conversation and did not stop. Yes, he later went into the observation portion of the composite car and had a talk with one of the gentlemen that had a conversation with defendant. Yes, he came back and looked into the washroom again and defendant was then alone, asleep. He imagined that was around nine o'clock, between nine and ten, he thought. Witness didn't wait up

(Testimony of Sergt. Felix H. Simons.)

any longer, but went to bed about ten o'clock, he thought. The next morning he saw Mr. Albers just for a moment, when he got off the train.

Testimony of Sergt. Felix H. Simons, for Defendant.

Thereupon Sergt. FELIX H. SIMONS was called as a witness in behalf of the defendant, and being first duly [158] sworn testified as follows:

That he lives in Multnomah County. Was born in San Francisco, California. His people were born in Germany. He knows Henry Albers; has known him since September, 1914. For about two years he was Mr. Albers' private secretary, commencing about the early part of 1917. Both before and after America went into the war. He knows Mr. Albers very well. About 102 boys, as far as he knew, went out of the Albers Milling Company's establishment to the war. They have two gold stars. Two boys have been killed in the service. At the time the draft came along he was somewhat worried about it because he didn't care for—never did care for military life, so he consulted Mr. Albers on several occasions and Mr. Albers told him not to worry about it. He says go into it, join the army, as he said it. And it would make a better man out of witness, both mentally and physically, and that it would soon be over and it made no difference when he came back, he could always come back to the firm. And if there was no opening he said they would make a place for witness. Yes, on several occasions defendant has spoken to some of the boys. He remembered one, the order

(Testimony of Sergt. Felix H. Simons.)

clerk, who was claiming exemption on account of his mother, and defendant told him that he ought to join, it would make a better man out of him. He told him this notwithstanding the fact that he was obligated to support his mother, yes, sir. Witness did not, from his intimate relations with Henry Albers as private secretary before America went into the war and after America went into the war, ever know defendant to utter any things against the Government of the United States. Defendant's utterances against the United States Government had been absolutely none. They had [159] been for the Government. Witness is 24 years old. When witness went into the service defendant told him while he was gone, if there was anything he could do for witness, financially or otherwise, to take care of financial affairs, he would take care of them. Just let him know, and he would take care of them. In other words, he promised to look after witness' family during the time he was in the service of the Government of the United States, if necessary.

On cross-examination the witness testified that he enlisted July 23, 1918, at Hillsboro. That was his Local Board. He was 25 August 15th, and he had worked for Mr. Albers since 1914. He is not married. He had a discussion with Mr. Albers about the Draft Act. He didn't recall just what time it was, but it was about the time the Draft Act was passed, yes, sir. Witness was discussing with defendant the status of witness in the draft. Witness knew he would be in the draft. And defendant

(Testimony of Sergt. Felix H. Simons.)

advised him if he was called to go, and he did go when his call came. Yes, he had heard Mr. Albers express pro-German feeling before we entered the war. He could not say that defendant was quite pronounced in his views as to the military situation abroad. He could not say so. Oh, defendant was for the Germans, naturally. He was very outspoken in that particular. Witness didn't know that he was so outspoken all the time. He could not say when defendant started this. No, sir, witness was not working for him on the 31st of July, 1914. Went to work September 17, 1914. He didn't recall that defendant was pronouncedly pro-German when witness went to work for him in September, 1914, because he didn't have much to do with Mr. Albers at that time. He had done work for him in the first part of 1915, and then [160] off and on. He could not recall that defendant was pronouncedly pro-German then. At a later date he became somewhat pronouncedly pro-German. When it did occur is more than he could tell, but it had ceased absolutely by the first of April, 1917. When we were about to enter the war he never heard Mr. Albers make any remarks on the war subject on either side. He hadn't ever heard Mr. Albers discuss the advisability of this country entering the war at all. Never heard any discussion of that kind, no, sir. Well, before we entered the war, yes, he had heard Mr. Albers make pro-German utterances relative to the Allies, the English and the Germans. He never heard him discuss the matter of the "Lusitania," no,

(Testimony of Sergt. Felix H. Simons.)

sir. He didn't recall that. He didn't remember exactly having heard any discussion from Mr. Albers in the matter of the alleged atrocities in Belgium and Northern France. And had not heard him express an opinion as to the outcome of the war. He could not say that Mr. Albers talked very much when he was about. About all he recalled was that he went to ask Mr. Albers about going into the draft and later told him if he were called to go.

On redirect examination the witness stated that the defendant told him, as he said, to join the army, before he was drafted. Yes, must have been six months before. And not to worry about his mother, or any of his people. That if defendant got word that he would look after her.

On recross-examination the witness testified he was still in the service, stationed at Camp Lewis. Had been over there the last six months. Had not been stationed at other points prior to going to Camp Lewis. Had been there all the time. [161]

Testimony of Dr. Ernest A. Sommer, for Defendant.

Thereupon Dr. ERNEST A. SOMMER was called as a witness in behalf of the defendant, and being first duly sworn testified as follows:

That he came here in the summer of 1886, is a physician and surgeon. Graduated from the Medical Department of the Willamette University, Portland, in 1890. Studied in Johns Hopkins, also in New York, and he had studied abroad. He studied

(Testimony of Dr. Ernest A. Sommer.)

three years in Germany. Had studied in France and studied in England. He is a school director here and has been in the army six months. He was captain. He knows Henry Albers, yes, sir; quite a while. Thought he met Mr. Albers the first time in January or February, 1893, or possibly 1894. Could not exactly say the year. The first time he met defendant the latter was employed, he thought, by the McKay Estate on the corner of Third and Stark Streets. Defendant was taking care—machinist for the McKay Building at that time. Defendant at that time, if witness remembered correctly, was suffering from rheumatism, or something of this kind, and witness was called in to see him. Yes, he knows about defendant's drinking habits. Witness had been sent for a number of times when defendant has been on a spree. He had been asked to take care of defendant and look after him during those times and had done it. Witness thought he was the only physician that defendant applied to during these years, unless there was some special line of work for which he consulted other physicians. The number of times that he had taken care of defendant when he was in this condition witness could not say, but knew it must have been a number of times. He should say defendant was a periodical drinker of the worst type. These men (periodical drinkers) will drink, and drink to excess, and drink to such a point that they [162] absolutely lose all ideas of social conditions, rules, regulations and things of that kind. Then they sober up and go along for long periods of time

(Testimony of Dr. Ernest A. Sommer.)

without taking any drink of any kind, and then go off on another. No, witness thought that they do not to a certain extent have any idea as to when these spells will come on. He thought they go along and try to keep from drinking for a long time, until this desire to drink comes over them, and after they have started, why, they cannot stop it. He thought it is firmly a diseased condition. He would say defendant, when he is drinking, was, putting it plainly, a damn fool. He had tried to reason with him when he was in this condition and could not reason with him in any way, shape or manner, and he had talked to him after he was sobered up and defendant did not know what he was trying to do for him. He is just a perfectly helpless wreck when he is in his cups, and when he is otherwise witness thinks he is one of the most mildest mannered men, a man that would not harm any person at all. He is a man charitably inclined, a man of good behavior when he is not drinking. His general conduct, aside from his cups, is that of an exemplary citizen. He had never heard him say anything derogatory of the Government of the United States of America. He did not know when defendant was made a citizen of the United States, but he knew that the older brother came to Portland first, and later on witness became acquainted with *he* and he thought it was some time in the fall of 1893, he would not be positive, but witness was surgeon on a trans-Atlantic steamship line running out of New York to the continent, and they were returning from New York into Holland, Rotterdam, when witness brought his other

(Testimony of Dr. Ernest A. Sommer.)

brother William Albers, Frank Albers and his sister [163] across from Germany. They embarked from Rotterdam, Holland, on the Holland steamship line at that time. The sister was alone with these two boys. Witness did not know when George came across. He knew that—as the story goes—the father was in the milling business in the old country. Their mother died and after these boys were established here and had a home of their own they sent for their father and brought their father to this country, and their father died in this country. Witness had never heard defendant say one word derogatory of the Government of the United States.

On cross-examination the witness testified that he was no relation to Henry Albers. The older brother, Ben Albers, married witness' sister. Ben was his brother-in-law, yes. He had been very well acquainted with the Albers family, the entire family, yes, sir. No, he knew nothing about Henry's condition on the 8th of October, 1918. The last time he saw him was some time—personally—was here in—he thought it was the first part of July when witness left Portland and went into the army, the last time he saw defendant. He had never heard Henry express any pro-German views, never. No, sir. He didn't think they had any particular conversation on that line at all before America entered the war. Defendant was down in Oakland a good deal of the time when they were building the mill, backwards and forward. He never discussed the war with witness at all, no, sir. He hadn't talked to Henry since July,

(Testimony of Dr. Ernest A. Sommer.)

when witness left for the army. Had not seen Henry since that time to talk to him. He met Judge McGinn yesterday or the day before, in front of the Oregonian Building. He met Mr. Citron, he thought, about the time they brought the subpoena up, about a week ago, practically. He didn't decide [164] to become a witness when he was subpoenaed. He didn't decide it, he concluded he would come up here because he was subpoenaed. He didn't want to be a witness.

On redirect examination witness testified that his sister is dead. The children of Ben Albers, the oldest brother, are witness' nieces. Three of them. Ben afterwards married again, married Ida Wascher, and they have four children there. Four with Ida Wascher and three with witness' sister.

Testimony of Conrad Lehl, for Defendant.

Thereupon CONRAD LEHL was called as a witness in behalf of the defendant, and, being first duly sworn, testified as follows:

He was born in Russia. He was seven years old when he came to the United States. He entered the service of Albers Brothers about six and a half years ago. About August, 1913. About a year before the war. He has known Mr. Albers ever since he has been employed there. When the United States declared war, and just before the boys—just before they wanted to draft the men, why, they all wanted to go into the war, so Mr. Albers—before this he said to the boys that it would be a great experience for them and

(Testimony of Conrad Lehl.)

that it would make men out of them. He didn't say this just exactly in the presence of all of the employees, but witness was there and a few of the other boys, but witness could not tell who they were. Witness remembered Robert McMurray. He didn't know whether it is the son of the Superintendent of Traffic on the Oregon Railway and Navigation Company, or not, but he knew Robert McMurray, or Second Lieutenant McMurray. He was there at the time the boys were there. They always used to get together in the office and talk about those things and Henry came along and he encouraged the boys, that is all. He encouraged the boys to go to war and to fight for the Government of the United [165] States and against the Imperial Government of Germany, yes, always. No, sir, he never heard defendant say a thing against the Government of the United States. Defendant was always up for America since when the United States entered into the war. Ever after the United States entered in the war, strongly for the United States, yes, sir. No, sir, there was no fifty-fifty there, not that he had ever been in defendant's presence at the time he was speaking. Witness is not now in the service. His service ceased December 17, 1918. He is working at Albers now. Yes, sir; his place was open when he left for the army, open until he came back and when he came back he found it there, yes, sir. The other boys, every one that has come back so far has come there that he knows of. One hundred boys went out of the Albers Milling Company to the service of the Government of

(Testimony of Conrad Lehl.)

the United States and against the military German Empire. He didn't know how many went from Portland and didn't know how many were volunteers.

On cross-examination the witness testified he was nineteen years old. He was in the service two months. He left for Corvallis September 20, but he wasn't inducted until the 15th of October, 1918. He enlisted at Corvallis, S. A. T. C. He had registered in the draft before he enlisted. He was at Corvallis about two months in the Student Army Training Camp, and had been out of the service since December 17. He stayed at Corvallis helping a lieutenant on the 17th and on the 18th he came back, and he thought on the 19th he went to work for Albers and has been working there steadily ever since he went with Albers Brothers except these two months. He works there in his uniform since he came back. [166] Albers Brothers do not require it. He does that himself. He is assistant cost accountant. He works on the books. Well, he didn't know whether it is books, all kinds of red tape, that is all, no books to it. No, sir, he does not make out invoices or things of that kind. Just finds the cost, you know what that is, cost of material, etc. He had never heard Mr. Albers say anything concerning the war or against the Government of the United States since we entered the war. He had not heard him say anything against the United States at any time, but he was strongly for Germany before America declared a state of war. He did not know whether defendant believed the German cause would triumph or was in favor of it. He

(Testimony of Conrad Lehl.)

could not just exactly express his opinion about it. He did not know whether defendant hoped the German cause would lose. He never said anything about that. Witness was not able to find out. Between 1913, when witness went to work at Albers', and the time the United States went into this war on the 6th of April, 1917, he had not heard Mr. Albers express any views as to the outcome of the war. No, sir, he had not heard Mr. Albers discuss the "Lusitania," and had not heard him discuss the alleged atrocities or cruelties said to have been practiced by the German armies in Belgium and Northern France. Had not heard him discuss the sinking of the "Sussex" or the "Gullflight." He never heard Mr. Albers talk much about the war at all.

Testimony of Richard K. Clark, for Defendant.

Thereupon RICHARD K. CLARK was called as witness in behalf of the defendant, and being first duly sworn testified as follows:

That he worked for the Pullman Company as porter. Had been in the employ of the Pullman Company as a porter nearly thirteen years. He does not know Henry Albers [167] personally. Sees him sitting over there by the side there. He recognizes him, yes, sir. He saw Henry Albers at the Oakland pier about ten P. M. on the 7th of October, 1918. In his opinion defendant was about half drunk. About 11:30 defendant went to bed and he didn't see anything more of him until the next morning. When he went to bed he was pretty—about half drunk. He

(Testimony of Richard K. Clark.)

went to bed alone that night. Defendant got up about ten o'clock the next morning, he thought, about ten. From then on he was continually drinking whiskey. Whiskey that he had with him. He had a quart, anyway, that witness knew of. And he could not say positively whether he had any more than that. He saw those fellows get around him after they left Grants Pass, about 7:30 or 8:00 o'clock, somewhere around there, the night of October 8, 1918. Gaumaunt or Tichenor. Mr. Tichenor—Gaumaunt was the moving spirit in surrounding Henry Albers at that time. Gaumaunt was the leading one of the two. Mr. Albers had been drinking pretty heavy all day and that evening, after these men surrounded him, witness knew the condition defendant was in and he wanted to get his whiskey away from him, and so about 9:00 o'clock he went to try to get Mr. Albers to go to bed, and he took his grip from the washroom to his berth and after he had done this this man Gaumaunt came and said he wanted that grip. He said, "I want that grip." He says, "There is something in it I want to get out of it." Witness said, "What do you want with it?" He says, "Something in it I want to get out, something in there I want." And witness said, "What authority have you to want this man's grip?" he says, "Well, I am an officer." Witness said, "Well, you will have to show me if you are an officer," so in the meantime the Pullman conductor [168] came along and witness says to the conductor, "How about this man? He claims he is an officer and wants this man's grip. What shall I

(Testimony of Richard K. Clark.)

do about it?" The conductor said, "Well, let him have the grip." In the meantime Gaumaunt showed witness some kind of a little badge. Witness didn't know what it said on it. Gaumaunt said that was his authority, he was an officer. He showed witness some kind of a badge. Gaumaunt didn't say anything at that time excepting that he wanted the grip, there was something in it. Later he said the only way to get a German to talk was to get him full; get him full of whiskey. Witness thought that was all that he heard at that time. This was at Roseburg he was telling witness this. Witness didn't hear any conversation that was going on. He did not hear a disloyal sentiment uttered by Henry Albers from the time that he took the train at Oakland until he got to Portland. In the daytime he was in that washroom on the observation-car from every ten to fifteen minutes. This was an observation sleeper, and defendant was sleeping in the observation-car. The observation is in the rear end of the sleeping-car section. When defendant went to bed he was stupified from drink. Witness put him to bed. After he got him down to the berth the brakeman helped him. Defendant wasn't able to take his clothes off when he put him to bed that night. He slept in his clothes, to the knowledge of witness, as far as he knows. He wasn't able to take his shoes off. Slept in his shoes. Witness saw Mr. Tichenor making notes after he put defendant to bed and after they had taken his grip back. He saw Tichenor making notes when he went and put defendant to bed finally—the last time. He

(Testimony of Richard K. Clark.)

was making notes then, yes, sir, [169] writing it down. There was two or three of them with him. This man Mead and Gaumaunt and Mr. Kinney. Witness thought there was another man, three or four of them. Mr. Tichenor was writing it down and they were all around him. Witness thought they were giving the information and the writing was done by Mr. Tichenor. When these conversations were going on Tichenor was in a little hall right by the smoking-room, listening. He was listening and peeping. Peeping and listening, yes, sir.

On cross-examination the witness testified that he didn't hear any disloyal statements and did not hear any loyal statements made by Mr. Albers. He didn't hear either way. He had been introduced to Mr. Tichenor. He saw him about a year ago the first time. Saw him in Roseburg one morning. Yes, he knew who Mr. Tichenor was. Knew he was a United States Marshal. Knew his name to be Tichenor, didn't know his first name. He got on at either Medford or Grants Pass, witness could not say which of the two places. Knew he was a Government official, yes, sir. Witness didn't know Mr. Mead except that he was pointed out to him. The brakeman pointed him out. Told him that was Mr. Mead; to-day. Pointed him out to witness outside there in the hall. Witness didn't know the brakeman's name. Thought he was a witness for the defense. This Mr. Mead happened to go by and the brakeman says, "There is Mr. Mead." That was the first time witness saw Mr. Mead since October 8, and he recalled that was the

(Testimony of Richard K. Clark.)

gentleman whom he saw on the train. Witness knew what section Mr. Mead had, yes, sir. Mr. Gaumaunt got on at 16th Street, Oakland. He was positive of that. He remembered that he got on. Remembered him when he got on at 16th Street. [170] Witness saw him get on. Witness first learned his name was Gaumaunt when he went up to Mr. McGinn's office. He went up to Mr. McGinn's office a little after this incident occurred on the train, about a couple of weeks later. Mr. McGinn sent for him; and he thought Mr. Citron told him the name of Mr. Gaumaunt. Yes, sir, McGinn was present also. Mr. McGinn was right sitting beside. They didn't show him a picture of Gaumaunt. Witness described one of the men to Mr. Citron and he told witness that that was Gaumaunt. That is how he happened to know him by that name. He saw him out in the hallway about the courtroom, he believed. He knows the difference between Mr. Gaumaunt and Mr. Kinney. He could not state positive when he knew the name of Mr. Kinney as being one of the passengers on that train. He wasn't sure who told him. He wasn't positive whether Mr. McGinn did; somebody told him. He had never seen Mr. Kinney from that day until to-day. He found that out—where these other passengers belonged. He sizes up his passengers pretty good when they get on. He sized Mr. Albers up too. He noticed Mr. Albers was full; that was the reason he sized him up. Mr. Albers was full when he got on the train at Oakland. He didn't size up a gentleman by the name of Mr. Swetland. He does

(Testimony of Richard K. Clark.)

size up all his passengers, but don't take particular notice of all of them. He took particular notice of Mr. Albers because he was drunk. He noticed Mr. Gaumaunt; he was the only one that got on his car at 16th Street, that is the reason he noticed him. Mr. Albers was about half drunk, yes. He had lots of whiskey in him. His condition was noticeable. He had lots of whiskey in him. He had some in his grip. He first learned that next day, after they got up on the [171] road somewheres. To the best of his recollection defendant got up about ten o'clock. He didn't think he saw Mr. Albers sitting and talking with anyone that night after he got on the train on the 7th. Didn't remember seeing him talk with a gentleman who was Mr. Swetland. They don't have so much time to size the passengers up that first night, because, you see, they go to bed early. They go to bed. He didn't pay much attention to Mr. Kinney that night. Mr. Gaumaunt, he didn't pay so much attention to him except he knew he got on at 16th Street. His attention was next called to Mr. Albers after he got up. About ten o'clock in the morning. He went in the washroom. Then he was drinking whiskey in the presence of witness. It was in California in the morning. It is up to the conductor—it is not up to him to permit drinking. He is only the porter. Defendant took the bottle out of his grip, yes, sir. He did that in the washroom. Witness went in there for the purpose of cleaning the car, cleaning that room. Defendant wasn't in such bad condition when he first got up. Witness was able to talk with him.

(Testimony of Richard K. Clark.)

He did not tell witness his name was Mr. Albers. Witness first found out after he had this trouble with Gaumaunt, when Gaumaunt wanted to take his grip back to the washroom. At that time witness was making his berths up. He begins anywhere from about seven to seven-thirty. It usually takes about a couple of hours to make up all the berths. And during that time was when the conversation took place in the washroom. Witness was busy engaged all that time in making up his berths. He didn't hear any conversation. He had occasion to go by and he saw these men in the washroom. He didn't know what they were there for. Yes, most of this took place during the time [172] he was making up his berths. The train got into Roseburg about 11:30 that night. Somewheres around there—11:20. He believed they were about twenty minutes late. They were a little late anyway.

In redirect examination the witness testified he found a detective card, the Field (?) Detective Agency, in Lower 1 occupied by Mr. Mead, he thought.

On recross-examination the witness testified that occurred coming into Portland. He found it in his berth. Nobody else in his berth. He didn't know if Mr. Mead is connected with the Field Detective Agency or not. He first told that story to Mr. McGinn. He told him to-day, for once. Told him this morning, or this afternoon. He didn't know where the card is. He gave Mr. Mead the card back; yes, sir.

Testimony of George Lawrence, for Defendant.

Thereupon GEORGE LAWRENCE was called as a witness in behalf of the defendant, and, being first duly sworn, testified as follows: .

That he lives in Portland, Oregon. Has lived here about ten years. Lately he came from Louisiana, from Camp Beauregarde. He knows Mr. Henry Albers, the defendant in this case. Has known him about four years. Prior to entering the service of the Government of the United States he was traveling for Albers Brothers Milling Company as traveling salesman. He was accepted for enlistment in the service of the Government of the United States in May, 1917. About a month and some few days after we entered the war. He volunteered. He did not have any conversation with Mr. Albers before he went into the service. He had a conversation with Mr. Albers after he entered the service. He was up at the office and he met Mr. Albers, shook hands with him, and Mr. Albers says—they talked general things a few [173] minutes—“Well,” he says, “it is a fine thing for a young man to be in the army, a fine thing.” He did not say anything else. Defendant said, with reference to his place there in the company, that witness could come back—his job would be open. He is going back to it the first of the month. Returned here Saturday—last Saturday, and the first of February his job is open to him. His rank is First Lieutenant. He did not, in all the time that he was in the employment of that company, hear Henry Albers say one word against the Govern-

(Testimony of George Lawrence.)

ment of the United States of America or against the army of the United States, or the Navy of the United States of America.

On cross-examination the witness testified that he went to Training School a very short while at Camp Johnston, Florida. That was after he went into the service. He first went, after leaving Portland, to Vancouver Barracks, then Camp Johnston, Florida. He went to the Training School about eight or nine months after entering the service. He was at Vancouver some length of time. He enlisted in the Medical Department. He had no conversation with Mr. Albers prior to entering the service about the war in any shape. About all he said to witness was that the army was a fine thing for a young man, yes, sir. He seemed to be very much in favor of it. Prior to that time witness had never heard him discuss the war situation at all, and had not heard him discuss it any since that time. Witness left shortly after that and he had been in camp.

Testimony of George A. Westgate, for Defendant.

Thereupon GEORGE A. WESTGATE was called as a witness in behalf of the defendant, and being first duly sworn, testified as follows:

That he is not of German [174] ancestry. His ancestry on his father's side is American for two hundred and fifty years or so. His mother was Scotch and was born in Canada, and witness was born in the United States. He has been connected with the grain trade most of his mature life. He knows

(Testimony of George A. Westgate.)

Henry Albers, the defendant in this case. He is acquainted with Albers Brothers Company. He was appointed Surveyor-general of this State by President Roosevelt and served partly under President Taft. He has been in the service of Albers Brothers about five years. He is assistant manager. No man in the service of the Albers Brothers Milling Company has more complete access to all of its documents than has witness. The secretary, of course, keeps the papers, but he thought it fair to say that he has access to every department of their business, every department of that establishment. He thought he knew that business pretty well. He had the responsibility in the line of grain more particularly; he handles that almost exclusively. He never heard Mr. Albers make a disloyal statement against the Government of the United States. Witness knew what defendant's attitude was with reference to the military and naval departments of the United States, and defendant's attitude was in support of the Government and in sympathy with it. He should say defendant was more pro-American than he was anti-German. They (Albers Brothers Milling Company) have somewhat over one hundred enlistments in the service of the United States Government. He could not give the exact number, but it was over one hundred. That was from the system there, all the mills. He could not give the exact number from here. It was about in the general ratio, possibly between thirty and forty. [175]

(Testimony of George A. Westgate.)

On cross-examination the witness testified that he thought there were altogether in the system about between nine hundred and one thousand employees, and when witness said enlistments he meant to include voluntary enlistments and all others who entered the military service. He could only judge in the line that he is interested and he thought that they had just a little the best of other houses in their line in respect of the percentage of men enlisted, including those who were called by the draft. The boys went in the beginning, the cream of them enlisted voluntarily. In his own particular department the cream of the boys enlisted voluntarily before the draft.

Testimony of Jacob Speier, for Defendant.

Thereupon JACOB SPEIER, was called as a witness in behalf of the defendant, and being first duly sworn, testified as follows:

He had been in the military service of the United States about three months. He is not in that service now. His service to the Government of the United States ended about the 13th of December, 1918. He knows Henry Albers, the defendant in this case. Could not say the exact time he had known him, probably ten years. He could not *day* what the attitude of Mr. Albers was towards the Government of the United States and the Imperial Government of Germany since America entered into the war in April, 1917. He really could not say that he knew of any particular instance in that time in which he could state that Mr. Albers' conduct became known to him.

(Testimony of Jacob Speier.)

Mr. Albers offered him his dock down there. He asked Mr. Albers if they could put some of their ships at the dock and he said, yes. He could not recall what else Mr. Albers said. He told him they could have the dock. [176]

Testimony of Bert M. Denison, for Defendant.

Thereupon BERT M. DENISON was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

That he knew something about the assets of the Albers Brothers Company. Means of learning their value arose out of his intimate connections secured by being at the meetings of the Board of Directors, being auditor of the company, and having charge of their bookkeeping records and everything of that nature, for about twelve years. He has been with them for twelve years and is still with them. Knows them all intimately and well. Knows Henry Albers very well. Yes, sir, he thought he knew what Henry Albers' attitude toward the Government of the United States has been since America entered the war in 1917. His attitude has always been that the United States should win, the United States and its Allies. He thought defendant's net worth is about \$250,000.00. Knowing all that he does about defendant's personal affairs and his own liabilities and his own assets, witness considers that is all defendant to be worth. There is no one that has as intimate a knowledge of that concern as witness has, not among the directors or stockholders or employees,

(Testimony of Bert M. Denison.)

no, sir. He doubted whether any of the employers had as much knowledge about the inside workings of the business as he had, take it altogether. Albers Brothers Milling Company since the Government of the United States entered this war has subscribed \$300,000.00 in Liberty Bonds. The company when Mr. Albers was president. They have purchased \$300,000.00 in Liberty Bonds and they still own those bonds, all but \$25,000.00, he believed. The \$25,000.00 they sold to the employees at seventy-five cents on the dollar, to encourage the employees to buy them. That was on the first issue. [177] They paid one hundred cents on the dollar and gave it to their employees at seventy-five cents on the dollar, yes, sir. The net loss to the company was one-fourth of \$25,000.00. He had a memorandum from which he could state at this time just what was done by the Albers Milling Company towards the war, towards Liberty Bonds and towards contributions to the various charities connected with the war. He had the list from their own office, and the list that was furnished to their office as the head office. The list that comes from the different branches. He had it in his pocket. Albers Milling Company is an Oregon corporation. It has branches in Bellingham, Seattle, Tacoma, San Francisco, Oakland, Los Angeles and Ogden. The concern subscribed the following towards the war: The First Liberty Loan was \$25,000.00, Second Liberty Loan \$50,000; Third Liberty Loan \$100,000; Fourth Liberty Loan \$125,000; total of \$300,000. To the Red Cross drives, \$8,724.

(Testimony of Bert M. Denison.)

To the Y. M. C. A. \$2,255. To the Knights of Columbus, \$825.00 To the United War Work Campaign, \$10,155. Then there were sundry subscriptions in amounts from \$100 to \$300 that covered such things as buying a motorcycle for the Oregon Machine Gun Company, for the Salvation Army funds, Armenian funds, Boy Scout funds, Soldiers' Christmas funds, Multnomah Band, advertising for drives, Base Relief Hospital, Minute Men, Canteens, Food Administration, American Protective League Society, for the Secret Service Division, Y. W. C. A., Pacific Aero Club, Camp Freemont, National Defense League, Council of Defense, Belgian Relief Ship, and probably three or four hundred others. The aggregate of these sundry items was \$10,373.50, making a total of \$32,332.50 given away. [178] This was done by the concern during the time that Mr. Henry Albers was the president of it. Mr. Albers' attitude toward the boy that went to the front in the war was always very favorable, speaking to the boys about going, encouraging them to go and promising them their positions when they came back, and his promises have been redeemed and are to be redeemed. No man that ever went to the front will come back without having his job there for him. No, sir, what has been said about these people selling their Liberty Bonds is not a fact. There has never been anything in what has been said about their not hanging up the American flag. It was untrue, always. Witness had heard the report about ground glass that was put into their flour. Had no foundation whatever, of

(Testimony of Bert M. Denison.)

course; absolutely untrue, yes, sir. Witness as a matter of fact had been humiliated time and again by reports that were put out against the Albers Brothers and their loyalty, that were unfounded. Witness knew all Mr. Henry Albers' expenditures. He did not think that there is a dollar that Henry Albers spends that he did not know pretty nearly where it goes. Defendant keeps his accounts in the old-fashioned way, has the old-fashioned way of keeping them on the firm book and every dollar that he gets has to go through their rather elaborate voucher system. It passes through the hands of three or four men, and each voucher must have a paper attached vouching for the item. He never knew of Henry Albers contributing one dollar to any government in the world outside of the Government of the United States. The Government, of course, had access to their books at all times. The statement of their business is audited periodically and the Food Administration statements, which were very numerous, include [179] Inventory Statements, Profit & Loss Statements, and everything of the details about their business.

On cross-examination the witness testified: He had been connected with the Albers Brothers concern twelve years, a little over twelve years. He is Secretary of the corporation. Mr. Albers' attitude since the war, that is, since the entrance of the United States into the war, has been to the effect that he was anxious that the United States and its Allies should win. Defendant's expressions were mostly

(Testimony of Bert M. Denison.)

in meetings of directors in which they were passing on Liberty loans or other questions about the Government, in which he was strongly in favor of supporting the Government in all ways. Defendant didn't directly express the wish that the United States and its Allies would win, only in these directors' meetings. Never heard defendant make that remark in those words, no, sir. Before the United States entered the war defendant was not decidedly pro-German in his views in the office or around the business. Not to the knowledge of witness. Not to him, anyway. He didn't know then that the reports that came in through these things that Judge McGinn mentions, about glass and oats and flag and all that sort of thing, came from Henry Albers in any way. The statement that Henry Albers, the defendant in this case, was decidedly pro-German prior to the time the United States entered the war has no basis in fact, so far as witness knows. The corporation contributed three hundred thousand dollars to Liberty Bonds and thirty-two thousand some odd—well, roughly, it is three hundred thirty-five thousand contributed to various sorts of activities. As a business proposition witness considers the bonds a good investment. Albers [180] Brothers Milling Company is controlled by a Board of Directors. The Albers Brothers, Henry Albers and his brothers, control the majority of the stock. No, they do not own practically all the stock. There is about twenty per cent owned by other people. He thought Henry was the Chief owner among the

(Testimony of Bert M. Denison.)

brothers. Henry had 1568 shares of stock against 1533, something like that, owned by Will. There has been no change in the ownership within the last six months or a year, no, sir.

Upon examination by the Court the witness testified that the capitalization of the firm was one million dollars common stock and a million preferred stock.

On further cross-examination the witness testified the capital is not all taken. Three-fifths of it is taken, the rest of it is treasury stock. No, they do not declare dividends with their profits, they leave all their money in the business. They declare only such dividends as they need. Leave the major part of their money in the business. Roughly the accumulated profits amount to about two million dollars.

Testimony of Leo Davidson Cook, for Defendant.

Thereupon LEO DAVIDSON COOK was called as a witness in behalf of the defendant, and, being first duly sworn, testified as follows:

He lives in Portland. Has lived here about three years and three months. He is sales manager of the Albers Brothers Milling Company. Has occupied that position a little over three years. He is acquainted with Mr. Henry Albers, the defendant in this case. He never heard defendant make any statements pro or con to the employees or any employee of the Albers Brothers Milling Company with reference to service in the army and navy of the United States of America [181] during the war, the present war with the Imperial German Empire.

(Testimony of Leo Davidson Cook.)

But P. S. Brown, who had been witness' assistant, was in his office at one time prior, as he recalled, to the conscription act going into effect, and Mr. Brown was discussing with witness whether he should enlist or make a trial for the training camp. At that time Mr. Henry Albers walked into the office and made the remark that it was a good thing, that when the young man goes into the army, when he comes out it has made a man of him. That is the only remark he ever heard defendant make regarding the war. He did not say anything with reference to the position of the man being ready for him when he returned from the war. Mr. Brown is a First Lieutenant at Camp Lee, Virginia. He enlisted somewhere around between May or June, 1917.

Testimony of G. W. Harvey, for Defendant.

Thereupon G. W. HARVEY was called as a witness in behalf of the defendant, and being first duly sworn, testified as follows:

He is office manager for Albers Brothers Milling Company and knows Albers Brothers' staff from top to bottom. Without exception they are all Americans. He was speaking of the office. He knew this company during the entire time that Mr. Albers was its president. Mr. Albers was glad that the employees of the corporation were going into the war. There was one time he was in Mr. William Albers' office and they were discussing about the boys going, there were three of them went at one time, and Mr. Henry Albers in the course of the con-

(Testimony of G. W. Harvey.)

versation says: "Well, it is a fine thing; it will make men of the boys." And he encouraged them to go into the service of the Government during the war. This was some time during the month of May, 1917, just a little time after we entered the war. Witness did not know whether the [182] conscription act had been passed at that time or not.

Testimony of G. F. White, for Defendant.

Thereupon G. F. WHITE was called as a witness in behalf of defendant, and being first duly sworn, testified as follows:

He is cashier for Albers Brothers. Has been in their employment constantly a little over twenty-one years. He knows Henry Albers and knows the office force of the Albers Brothers Milling Company. It is pretty nearly mostly all American. He had seen nothing in Mr. Albers' attitude towards the war since the United States entered it but loyalty towards America. Nothing has gone on in the office in any way during that time that he has been connected with it on the part of Mr. Henry Albers to show that he was anything but a loyal American citizen. Witness is the oldest employee in the office. Witness had a nephew that went out of the establishment to the war. His name was McDaniels, and he was killed. They have a gold star down there in commemoration of his nephew giving his life to the American cause in this war. He didn't know that Henry Albers did anything for that nephew, only said he was very sorry that he should be killed.

(Testimony of G. F. White.)

Seemed to be affected very much, yes, sir. Witness has a son in the army. He is not an employee of the establishment. Witness kept Henry Albers' personal accounts. He never knew of Henry Albers contributing one cent towards the Imperial German Government or anyone representing or connected with it, and he knows defendant's accounts from top to bottom.

Testimony of John Murphy, for Defendant.

Thereupon JOHN MURPHY was called as a witness in behalf of the defendant, and being first duly sworn, testified as follows:

He knows Henry Albers. Witness is a longshoreman. Has worked upon the beach (dock) about seventeen years. Yes, he knew Mr. Henry Albers stated on one occasion to witness [183] and others that this was the best country in the world—more opportunities for a working man. He could not recollect just exactly what the others were. It was pertaining to the elevation and praise of this country, generally. He had never spoken to defendant about Bolshevism, but he had seen how detrimental defendant's system is to Bolshevism. It is on that he and others have commented. He guessed witness' people will try to save this country against Bolshevism. There isn't any Bolshevism in witness. Bolshevism—he never mentioned that word to Mr. Albers, but the way defendant conducts his dock has left it powerless—there is no incentive to Bolshevism. He runs his dock and he treats his men and

(Testimony of John Murphy.)

treats the longshoremen that aren't his men, that comes there to work, in such a manner as to make them satisfied with the conditions. He could give many instances if he wished and so could the other men that work there. He had never heard Henry Albers say a word against the American form of Government.

On cross-examination the witness testified he could not state the exact time when this conversation occurred in which Mr. Albers told him that the American Government was the best Government in the world and furnished the most opportunities of any Government. It is on various occasions he speaks—he comes around on the dock and as witness is working there he will come up and speak to him. He invariably speaks to him every time he goes on that dock. The last time he was speaking to Mr. Albers he thought it was on Third Street just before this country went into the war, and then while he seemed to sympathize with Germany, the remark came up, the witness thought it was broached by himself, "If this country," witness said, "If Uncle Sam takes a hand in it, it will be all off with [184] Germany." Defendant said: "Yes," "It is impossible—the resources of this country is too great. She would crush Germany," words to that effect. Witness could not give the exact words now that defendant made use of. But it left the impression on him, an impression that was already in his mind, that this country could not be beat by the world. The whole of Europe would not beat this country, to

(Testimony of John Murphy.)

witness' mind. That was prior to this country going into the war. Witness is that strong pro-American that he believed there is nothing in this world can beat this country. He didn't know whether defendant knew his views. He didn't think they ever spoke upon the subject prior to witness overtaking defendant on Third Street. He was walking along. They had been always talking upon America. Witness might say that any time defendant has been commenting upon the war, upon the system in this country and others, that is what witness drew from him—that this country—a man had the best opportunities in this country. It is generally known what witness thinks of it. He guessed everybody that knows him knows where he stands.

Testimony of John L. Ryan, for Defendant.

Thereupon JOHN L. RYAN was called as a witness in behalf of the defendant, and being first duly sworn testified:

He had known Henry Albers about fourteen years. He is the Grand Clerk of the Neighbors of Woodcraft, a fraternal organization, and secretary of the Rotary Club. He had had occasion several times during the fourteen years that he had known Mr. Henry Albers to observe him when he is on his periodic sprees. Altogether he would think probably half a dozen times. His opinion is that defendant does not know what he is doing when he is intoxicated. He had had occasion to see him after he was over them, to determine or ascertain [185] whether

(Testimony of John L. Ryan.)

or not the defendant knew what had happened while he was in that condition. Defendant absolutely knew nothing of what had transpired while he was drinking. Henry Albers sober was a very fine man; drunk he is a beast. Violent in his language and action, yes, sir.

Testimony of J. P. O'Neill, for Defendant.

Thereupon J. P. O'NEILL was called as a witness in behalf of defendant, and being first duly sworn, testified as follows:

He was born in Portland. His age is forty-two. He is a single man. He knows Henry Albers. He is interested with him in the schooner "Oakland." Has been so interested in the schooner "Oakland" about four years. They took it off the beach down here somewhere about Tillamook. Through his business relations with defendant he is frequently with him. He was with him in San Francisco in April last year, 1918. He recalled the incident of taking an automobile ride. Witness left here about the 12th of April, and Mr. Albers, he thought, arrived in San Francisco on the 19th. Witness met him at the depot with his local steamship agent and they went to dinner. Defendant had been drinking on the train some and had some for dinner, and he retired that night. After they went to dinner defendant remained at the bar. Witness went on up to bed. Saw in the morning when witness awakened defendant was not able to get up and he remained that way until the following Sunday week, that is, a week from

(Testimony of J. P. O'Neill.)

the following Sunday. Witness kept away from the office, fearing that defendant's brothers might find it out, until Friday night defendant's condition worried witness. Defendant's physical condition worried witness, and witness went to the brother and asked him if he didn't think it was advisable for them to take Mr. Albers to a sanitarium, as he was walking between the room of witness and his own, muttering to himself. So defendant's [186] brother told witness to take defendant out for an airing, Sunday, the following day, and to get him back home as quickly as he could. Witness left, he thought, the following Wednesday. It was Friday night the defendant was walking back and forth between the rooms nearly all night. He didn't sleep, witness didn't think, a wink. Witness has seen defendant drinking several times. When defendant is drinking he can walk all right. He can drink beer and wine, but the minute he takes whiskey he is a changed man. But it seems to go to his head, not to his feet. Sunday morning witness got up early and went for a walk, and when he got back it was about noon and witness persuaded defendant to get up and go down to the barber shop and get a shave about noontime, and he had a shave and a manicure and the young lady was late, or something. He had forgot the incident. Anyway, witness told her if she would remain that he would take her for a ride, or take her home, and while there defendant had, witness knew of, three drinks. He didn't know whether it was whiskey or brandy he had the porter bring in from the saloon. When defendant got in

(Testimony of J. P. O'Neill.)

the machine he fell asleep and witness thought it was only about three times that he awakened at all on the trip. They went down as far as Palo Alto and turned around and came back. Defendant did not carry on any conversation at all on the trip. That is intelligently. He muttered something at Palo Alto but witness could not understand him and did not think anyone else could. They turned around and started back, and halfway back Nature had asserted itself and he wanted to get out—he had awakened. The witness assisted him out of the machine. When he came back he looked at the two ladies that were in the machine, and he said, "Where did you come from," [187] he didn't even know them. A few days afterwards, when he went into the barber-shop and one of the ladies nodded to him, and defendant asked witness afterwards who she was and witness told defendant she had been on a machine ride with him and he didn't even know he had taken a ride. When he got back into the machine after getting out there on the road, addressing one of the ladies he said, "Where did you come from, Mamma," or something like that. One of the women took exceptions to it. Witness' recollection of it is that Mr. Albers and he were seated in the back seat and the two ladies were out in front, for he remembered one instance when they went around a turn defendant leaned up against him and he knew he was drooling at one time from the mouth and witness wiped his vest off. Witness would not be positive whether he introduced the young lady, Mrs. Gomes, to defendant there in the barber-shop. He

(Testimony of J. P. O'Neill.)

had no recollection. Witness' idea was that she was speaking to defendant or she was doing his work at that time when witness came into the shop. However, he might have introduced them; he would not be positive as to that. But he knew he was the one who invited Miss Gomes on that ride. On that trip he didn't hear defendant use any German phrase at all. Absolutely none. And he would say he did not. Witness was absolutely with defendant all the time and witness never heard defendant express himself at all. There was this time down at Palo Alto defendant muttered something that witness didn't believe anybody on earth could understand. He didn't know whether defendant spoke German or not; and then this other incident. Witness left the machine about ten minutes and called for the second young lady. Now, that is the only time that a conversation could be held like the one testified to by Mrs. Gomes, wherein she asserted [188] defendant stated he was a German spy and that he was ready to be shot then or any time; but defendant was asleep when witness left and he was asleep when he came back. Mrs. Gomes said nothing to witness about it. That could not have occurred at Palo Alto. Nothing of the kind occurred, no, sir. During that week that he was drinking he would not eat a morsel of food. He didn't have food for about ten days and he was drinking about three quarts of 3-Star Hennessy until that Saturday night witness went to the bartender himself and asked him if he could not send defendant up something that would sober him up. Witness was

(Testimony of J. P. O'Neill.)

worried about his condition. The bartender said, "I will go up and see him myself," and he brought up some beer, brought up three bottles of beer. And Henry drank it that night and the next morning early he telephoned for three more, as soon as the bar opened. And he drank those three bottles in the morning. That was besides the three drinks he had while he was getting shaved, yes, sir. No, sir, he did not during those times that he had been around with him hear Mr. Albers make any disloyal or seditious remarks of any kind. And witness had been perhaps the most intimate friend of Albers during this time. Shortly after, he thought it was a day or so after we got in the war, Mr. Albers came up and they were speaking about the schooner "Oakland," and he says, "Well, we ought to dispose of that as quickly as we can, for, thank God, the war now will soon be over." Defendant did not give the reason why it would soon be over, but witness inferred that it was on account of America entering the war. He was satisfied it meant that. They got down to the beach—he thought it was in December, and the boat was ready to be launched, and defendant asked Mr. Moody, who was launching the [189] boat if he had an American flag. Mr. Moody having answered in the negative, defendant said: "Well, before that boat is launched we must have one." They went over to Wheeler, trying to get one, but they could not, but the man who ran the soft drink place kindly volunteered to give them the flag provided they would replace it and they got the flag and brought it over

(Testimony of J. P. O'Neill.)

to the boat. Defendant's mind seems to be a blank after one of these sprees. Compared with his actions when he is sober, defendant drinking is a changed man entirely. He is really vicious and he is not responsible for what he says and does. When he is sober and *at* himself he is very docile and kindly.

On cross-examination the witness testified that he had been a close and intimate friend of Henry Albers for some years. He is his bondsman in this instance. When defendant was arrested witness was the man that arranged his bond and went on his bond. He has business association with defendant in the ownership of this boat "Oakland." Has no other business association with him. He had never heard him utter any pro-German sentiments and he has known his for twenty years. Personally witness didn't believe defendant ever did utter any pro-German statements. He thought if defendant ever had witness would have heard it, yes, sir. With reference to this trip to San Francisco in the spring of 1918, witness and Mr. Albers were staying at the Sutter Hotel. Witness had never known this Miss Gomes until he met her there. He would not be positive whether he learned that she was from Portland in talking with her and that he introduced her to Henry Albers. It might be; he would not want to say. If that is her recollection he would have no reason to think that was untrue. He [190] didn't think he had ever met her prior to this Sunday that they went out in the taxicab, or automobile.

(Testimony of J. P. O'Neill.)

He might have the previous Saturday. He knew he was in the barber-shop then. He thought it was about noon, or shortly after that he and Mr. Albers went to the barber-shop that day. Defendant was shaved and had a manicure. Witness was the one that suggested to Mrs. Gomes that if she would do that he would take her home or take her for a ride. They started from the hotel, there being just three of them at the beginning, Mr. Albers, himself and Miss Gomes. They later picked up a Miss Wade, and then rode out to Palo Alto. They were gone between two and three hours, he thought. He thought they left about one o'clock or so and got back about four—four or five. He would not be positive as to the time. He didn't know the distance down there. They would run about twenty miles an hour, something like that. He heard no conversation in the barber-shop. He was in the barber-shop just off and on while Mr. Albers was there. That being the case, of course he would not know what conversation occurred in the shop. He would not be positive, but his recollection was that he sat alongside of Mr. Albers in the car. He didn't see what reason Miss Gomes would have to make an incorrect statement, but he was almost positive she must be mistaken, for he recollected defendant at one time leaning over. However, she might recall it clearer than he did. He would not be positive. As they started out the young lady, Miss Gomes, said it was such a beautiful day that she thought a ride would do her good, so witness said, very well, if she cared he would get an

(Testimony of J. P. O'Neill.)

acquaintance of his and they would take a ride. That was before they started down to Palo Alto. He absolutely did not recall hearing Mr. Albers make any statements to the effect [191] that he was a Kaiser man or that he was a German spy, nor Deutschland uber alles. No, he did not recall any conversation between Miss Wade and Miss Gomes, or Miss Wade and himself to the effect that "We will have to get that man shut up or we will all be interned," no. He was positive Miss Wade never had that conversation with him. The subject of war, his recollection is, was never touched on, nor was anything said to the effect that the Kaiser is the greatest man in the world, no, sir. Nor that President Wilson has no brains, no, sir. Nor that there will be a revolution in the United States, no, sir. And he heard no statement by defendant that "I am a millionaire and will spend every cent I have to help Germany in this war," no, sir. Witness stated he was satisfied that Miss Gomes might have been telling the truth, but he thought if any conversation was held like that it was held in the barber-shop. She has it confused. He did not recall Miss Wade insisting that defendant be shut up and be made to be still with that kind of talk on the ride. He did not know of any reason why Miss Gomes would have reported these statements shortly thereafter if they are not true. He was not aware of any reason she had for reporting a lie about it. On that trip he didn't recall any conversation on the part of Mr. Albers except when he stepped out of the machine

(Testimony of J. P. O'Neill.)

and was gone for about five minutes and returned and he said, "Hello, Mamma, where did you come from?" or something to that effect, because Mr. Albers was asleep most of the time. He remembered that remark very distinctly. And defendant muttered something down at Stanford. He didn't know what that was, but it was only three or four words, whatever it was. These were the only things, he recalled distinctly, [192] that were said by Mr. Albers from the time they entered the barber-shop until they got back. That was all that was said, as far as Mr. Albers was concerned, that is to the knowledge of witness. He didn't think it was possible that defendant might have carried on a conversation without witness hearing it. He thought the witness Gomes was mistaken in saying that Miss Wade made serious objection to his talk. He thought Miss Wade would have spoken to him about it. The time he speaks of, the flag incident, was December 23, 1917, and they were all down at Wheeler, making their headquarters while he got the boat off the sands. It was a boat that had gone ashore near the mouth of the Nehalem and witness and defendant had taken it over and undertaken to salvage it. He did not know a man named Wardell, not by name, no. He had seen Mr. Albers under the influence of liquor considerable. Several different times, anyhow. He thinks he is not responsible for what he says or does when he is under the influence of liquor. At those times defendant is very antagonistic; rather assertive. Mr. Albers is very loquacious when he is

(Testimony of J. P. O'Neill.)

pretty well loaded up; that is his tendency. He is inclined to speak right out his views on anything.

On redirect examination witness testified that in testifying as to whether defendant had made any pro-German remarks at any time witness was not distinguishing between the time the United States was in the war and the period before. He misunderstood counsel. He had heard Mr. Albers—yes, he had heard him make remarks before the war; before we got in the war. Mostly against England. He never heard him make any remarks hostile to or in disparagement of the United States in any way, either before or after we went into [193] the war; no, sir. No, it was not in April, some time, 1917, that defendant changed his views concerning the war. That was quite a time ago they were discussed. He didn't know whether they were pro-German at that, even. Were discussing England. Defendant was very bitterly anti-English. He didn't think the outcome of the war was touched on at the time. Mr. Albers previous to the war was speaking about the German army. When Mr. Albers came back from Germany, witness thought it was 1906 or '07, he told witness he would not live over there if they gave him the whole country for the simple reason that he had no use for the military system. At that time he spoke disparagingly of the military organization of Germany. Witness had no recollection of discussing it with him during the time between July, 1914, and April of 1917. He did

(Testimony of J. P. O'Neill.)

not recall ever discussing any of the incidents of the war between those two dates with defendant. Witness was satisfied he had heard Mr. Albers discuss the war, but he could not say positively what it was or at what time. He didn't know, as a fact, that during that time, prior to the time we went into the war, Mr. Albers was very decidedly pro-German and discussed it on all occasions. It was rumored, but witness never discussed. He never heard him discuss the sinking of the "Lusitania" or the "Sussex" or the "Arabia" or the "Gullflight" or the Belgian atrocities. Never heard any discussion about the Christmas dinner in Paris. Never heard him make any bets. Never heard any discussion from Mr. Albers of the wonderful submarine campaign that was being waged by Germany; the organization of their sea force. Never discussed that with him, no, sir.

Testimony of Charles A. Barnard, for Defendant.

Thereupon CHARLES A. BARNARD was called as a witness on behalf of the defendant, and being first duly [194] sworn, testified as follows:

That he lived in Portland. Had lived there very near seven years. He is the sales agent for Eastern manufacturers of farm and mill machinery, grain-cleaning machinery and kindred lines. Had been in that business all his life, pretty nearly. He knows Henry Albers and the Albers Brothers Milling Company. He has had business with them. On August of this year, August 9, he and Mr. Albers made a trip

(Testimony of Charles A. Barnard.)

to Wasco, Oregon. They were together all day, all one day and night, and part of the next day. They left Portland here in the morning at seven-thirty. They were up there to inspect a flouring-mill with the possibility of Albers Brothers Milling Company investing in the machinery that was in the mill. Yes, he discussed the war with Mr. Albers on that trip. They had talk about it. No one else was in the discussion. Witness had heard some little vague rumors that had come to him in an indirect way that Mr. Albers was not a citizen, but witness did not think particularly about that. Their conversation was general, just as one would naturally talk about those things at that time. He didn't know that he could repeat word for word anything that was said. The conversation was general. Of course they talked about the war and the situation, the relative conditions as between the United States and Germany. The United States and its Allies, with the other nations. And Mr. Albers also during the day entered into quite a lengthy description of the trips that he had taken back and with relation to his meeting his relatives and his old friends there in Germany. The conversation was general, but its nature was of such a character that he could not discover that defendant was in any way in sympathy with Germany as against the United States. [195] He seemed to be very strong in favor of the United States. He knew in talking about the situation at that time, that was at the time the Allies were in the ascendancy, and it was stated by Mr. Albers in sub-

(Testimony of Charles A. Barnard.)

stance, and by both of them—they were both talking about the same line—that the war would eventually end in the success of the Allies. It was bound to be that way—it had to be that way, and that was the only successful termination of the war, and defendant was quite in sympathy; quite strongly in sympathy with the Allies at that time, and particularly emphasized at different times the fact that he was an American citizen and he was in sympathy with America in this struggle. Of course under the circumstances was rather keen to observe if there would be any tendency to sympathy, but he could not detect anything in any way whatever. Defendant was clear in his mind, absolutely; witness knew that. Witness has a son-in-law who is a Colonel in the United States Army and a son who is a First Lieutenant, or was a First Lieutenant in artillery. The son has had his discharge and is now in Kansas City. Mr. Albers' reference to Germany and about his meeting his old friends there in general was a regular detail of his trip. In fact, it was quite lengthy. They talked a great deal about it, because defendant expressed himself regarding the conditions over there and his friends and the sociability and his enjoyment there. It was along that line. He enjoyed himself very much over there; had a delightful visit. Witness could not recall that defendant particularly expressed himself with reference to his attitude toward the Kaiser, the war party of Germany, only that his expressions were to the effect that the war must close by the defeat of Germany.

(Testimony of Charles A. Barnard.)

Witness recalled that defendant expressed himself [196] as though it would be a hard and bitter fight and he regretted the conditions very much, that they existed—the terrible loss of life and property, but he did express himself that the fighting, of course, up to that time had all been on foreign soil and that it would probably be a hard, difficult fight if they did get on to the German soil. Witness could recall that in an indirect way. Witness was quite in accord with the idea. That was the idea witness had of the war at that time. Witness was born in Canada of American parents and he has lived in the United States all his life except the first year or so. His parents were American and he was not required to become naturalized. His people were already citizens, temporarily in Canada.

On cross-examination the witness testified that he had lived in Portland about seven years—seven years in June. From the beginning he had been a pronounced pro-Ally; quite so, and he didn't hesitate to let people know where he stood. At the beginning of the war witness was not strongly a pro-American. He was—he had always been pro-American, but then he wasn't pro—not antagonistic to the Germans entirely before the war, before he entered the war. Witness explained he meant when the war first opened. He was rather undecided at that time, simply because from lack of knowledge he didn't know who was right or wrong. After the invasion of Belgium he changed his mind immediately and has very

(Testimony of Charles A. Barnard.)

fixed opinions. He has asserted those opinions on all occasions. Didn't hide his light under a bushel in that respect, not at all. He always was decidedly pro-American and asserted himself in that respect, always. Having in mind airy rumors he had heard concerning Albers, of course it made him a little keen to observe defendant's remarks, yes, and defendant's attitude, [197] that he would take. These rumors were not generally to the effect that there might be some question as to Mr. Albers' loyalty to the United States. No, not that. More that—the rumors that reached witness were that when defendant was in his cups he was liable to say things he ought not to say. He showed no evidence of drinking at all. The expression witness got all the way through was that defendant was strongly of the opinion that the Allies must win. The impression witness formed from their conversation was that it was quite apparent to defendant that there was no possible outcome to the war except the defeat of Germany. At that time conditions had somewhat changed since earlier in the war, of course. He probably met Mr. Albers first in the neighborhood of eighteen or twenty years ago. He hadn't been well acquainted with him. His acquaintance had been more during the last six or seven years. Witness' business threw him in touch with defendant a good deal more during the last six or seven years, and his relations with defendant have been fairly close in a business way. He was thrown with the mill people more than with other people in the business world. He could not recall that he ever

(Testimony of Charles A. Barnard.)

discussed and exchanged his views with defendant prior to this time when they went up to Wasco, only in a general way, that they had conversations in the office when Mr. Albers was present. Mr. Albers had expressed his views to witness and witness had expressed his before that time, generally, in a general way, yes.

On redirect examination the witness testified that that the appearances of victory for the Allies in August increased rapidly after that date, certainly they did, until up to the time, October 8, it had become a certainty that the Allies would win. That seems to be the record, in short order. [198] Defendant when he was talking to witness seemed to be very frank and open in his conversation. No guard in any way whatever.

Testimony of Henry Albers, in His Own Behalf.

Thereupon HENRY ALBERS, the defendant, was called as a witness in his own behalf, and being first duly sworn, testified as follows:

That he was the defendant in this case. That he is fifty-two years old; was born on the 13th day of April, 1866, in the Kingdom of Hanover, in the little town of Lingen, on the River Ems. His father was a grain merchant. He did not do any farming that defendant knew of. He had a little garden, that is all. In the family were six boys and three girls. Defendant came to this country in 1891, being twenty-five years old at the time. He had two brothers that had preceded him here. Herman and Bernard.

(Testimony of Henry Albers.)

Herman was never in Portland; he died in Terre Haute, Indiana. He was a cabinet-maker, six years older than defendant. Bernard came to Oregon from Terre Haute. Two years after he was there he came to Portland. Bernard came to the United States in 1887, defendant thought, and in 1889 came from Indiana to Portland. Defendant and his brother Will came next. Will is two years younger than defendant. Defendant and Will came straight to Oregon, from Lingen to Portland, Oregon. When defendant came to Portland he worked at all kinds of jobs. Worked in the kitchen at Bishop Scott Academy, baked bread, tended the butcher-shop and done all kinds of work around the kitchen. He learned a little of the trade of a baker in Germany before he came. He knew enough about the baker business to bake bread. That was about all. He didn't learn it thoroughly. Before he came to this country he went to school until fourteen years of age, public school, then he [199] went to learn a trade for a few years. The milling business. Not a flour, a cereal mill. Bernard was not a miller. Defendant has another brother who worked in a mill. He learned the milling business in Germany. That was George. Besides baking defendant did everything that came along in the kitchen. Peeled potatoes, washed dishes. He worked as a cook at the Seaside Hotel about three or four months. He could not remember exactly. Then he came back to Portland and got a job with the McKay Building, looking after the machinery, running the elevator. Did all kinds

(Testimony of Henry Albers.)

of work generally. He was the janitor there and done everything there, swept the floor, collected rent and everything that came along. He did that about three years. The first day of May, '95, his brother and Mrs. Schneider and himself started in the milling business. Started on Front and Main Streets. Mrs. Schneider, Bernard Albers and Henry Albers. They called it the United States Mills; Albers and Schneider. It was a little feed and cereal mill. One of his youngest brothers, Frank, had been here about a year then. George was in Seattle. He came a year after defendant came. George was in Cincinnati, defendant thought, a year or two and then when they started business George came out here too. George worked, drove team, and the youngest brother, Frank, was in the store with Mrs. Schneider, and his other brother drove a team, also. Will drove a team. Defendant done the mill. Mrs. Schneider the inside work and his brother tended the office. Will wasn't a stockholder, but he was working there. He was on the farm for a while in Washington County. Will farmed over in Washington County, defendant thought, two or three years. He could not say. He began to work in the mill in '06 or '07. Defendant could not say for sure. His sister came to this country in '93 or '94, he could not [200] remember exactly. He has only one sister alive, the other two died in Germany before the boys came out here. Defendant's mother died when he was eight years old. His father came out in '96. He died, defendant thought, in the fall of '96. Came out here in the

(Testimony of Henry Albers.)

spring. When defendant and his brothers left Germany they left no property there. They never owned any property in Germany, none that he knew of. His father owned some but defendant guessed he sold it before he left there. Only his oldest brother and himself were connected with the little mill started on Front and Main Streets in 1897 or '8. Mrs. Schneider sold out in 1901 to defendant's oldest brother Bernard. The one that is dead. And that stock is divided around among the rest of them. He became connected with the business in 1902. It is that mill that has developed into this string of mills that the Albers Milling Company owns. They own mills now at Portland, Seattle, Bellingham, San Francisco, Los Angeles, Oakland and Ogden. They have mills at each of those places. Defendant builds practically most of the mills. He makes the plans when they build it and see that they get it in running shape, and the machinery, most of it. He is a machinery man. He doesn't have much to do with the clerical and office work of the business, and never bothers about sales. He looks after the mill, sees that it keeps going. That is his part of the business. He has been doing that practically all the time. The last two or three years he goes around the mill to look after the running part of it one place and another, that is about all. He don't work like he used to, for day and night. He don't do that any more for the last four or five years. He used to work day and night lots of times. Because of that he contracted what they call catarrh and he has been [201] doc-

(Testimony of Henry Albers.)

toring for years for that. Affects him all around here (indicating), right up over the top of his eye. He expected that came from dust from the flour. He was back to Germany in 1901 and again in 1912, just the two times since he came here. He never at any time had any connection with any official or agent of Germany. Neither in this country or in Germany. In no case. He never had any transactions or any negotiations with any such officers or agents. He never had a cent of property or any investment in Germany of any kind. His property holdings and interests are located all over in this country, in the mills. All in the mills and mill property. He came from the Kingdom of Hanover. When he left it belonged to the Prussian government. He never served in the German army. He came free. He went to what they call muster and came free. There had been something wrong with his condition. He didn't know what. They didn't enlist him. He was rejected. His oldest brother Herman served in the German army. Bernard was in a little while. He came out again. Not one of these younger boys served in the German army. Herman and Bernard are dead. Bernard died in 1908 and Herman died in 1895. When the war in 1914 started defendant was in South America. In Buenos Aires. He went for business reasons to see what was going on in that country. Bought some corn there. They shipped in several carloads of corn here to San Francisco at that time. Defendant went there to see if the corn was fit to be shipped out of the country or

(Testimony of Henry Albers.)

not; that is the reason he went out. Purely in connection with the milling business. Never had any connection in any way with the German government or with German purposes. Neither the German government nor any German interest ever had any [202] interest in the Albers Milling Company, never at any time. Defendant thought he had about a thousand marks when he left Germany, a few hundred dollars. His brother Bernard and his younger brother had all about the same. About three hundred dollars. That is what he had when he got to New York. When the war between Germany and France commenced in 1914 defendant did not take any position, as he knew of. He was at Buenos Aires. He didn't know what was what. He could not get any cables through. He didn't know what was going on here and he tried to rush back to his home country. By home country he means the United States. To get home it took him thirty-five days on the water, then from New York to here he thought five or six days. He stopped a few days in New York and in Chicago. After that he never did go around abusing the Allies. Never did go around praising Germany. He discussed with several people. He went to the Board of Trade and Grain Exchange. He talked like everybody else, he didn't think he ever did take the side of Germany. You know it was general discussion. Some fellow would call him Hindenburg, this and that, and he would call them back Kitchener, something like that, or Haig, something like that. They had that discus-

(Testimony of Henry Albers.)

sion, sure. Usually in the way of bantering, certainly. At this time, yes, maybe they had some discussion about the reports of the atrocities alleged to have been perpetrated by the Germans, that is all. He may have discussed that. Sure he thought the papers were making it a little strong, in some cases they did; pretty sure of it. He never thought the German people were capable of those things. After this country entered the war in 1917, in April, he never did from that time on, in any conversation, at any place, as far as he could recall, make [203] any statement antagonistic to the Government of the United States. Never, no place. On the train that was all blank to him. He didn't know anything about it. All he remembered, when he left Frisco, ten or eleven, ten o'clock, he met several friends of his coming to the hotel and they had a few drinks, and more, and more, and more, and more, then he went to the ferry, took a taxi and went to the ferry and when he crossed the ferry he met Mr. Swetland, the only one man he remembered meeting on the train. Don't remember seeing anybody else. Don't know anything about the 8th day of October, or next day when he got up. Don't recall going into that wash-room there at all, nor those men being around him, talking to him. Don't remember saying anything. Don't know that he saw anybody except that going on the train he met Swetland on the ferry. He never saw Bendixen before, before he saw him here. He never saw F. B. Tichenor except here on the witness-stand. Didn't know Mead before. He never saw

(Testimony of Henry Albers.)

Kinney; never saw Kinney that he knew. Allen and Lewis are not competitors of Albers Brothers Milling Company, they are customers. The witness Bendixen in testifying to the meaning of *schlach* don't know what he is talking about. He says *schlach* means destroy everything. That man absolutely don't know what he is talking about. He don't know German. *Schlach* means strike. *Schlach* is to strike and that is all there is to it. He didn't know anything about it. The statement of witnesses that he had said he never got anything except *sheis*, *sheis* in America, he didn't think he ever used that word. Both before and after the war he has always been for his country here. Always was, and why shouldn't he? All he has is here. He [204] never did complain that in America he got the worst of it in any way. Never did. Whenever he had any discussion about it he always told them it was the only country to live in. He told them that people didn't know what they had here. A good many didn't believe him. He always told them that because he had been around a little. He knew what this country means, what it is. He had some experiences in Germany when he was over there. They didn't do much to him. When he was there the last time he was over there he rode around with a machine and every corner he turned around was a policeman. He was disgusted with that. Didn't do particularly anything to him, but too much militarism in it, he thought. He was arrested—not arrested, they just come over and hand you a paper and you

(Testimony of Henry Albers.)

pay a certain fine. They don't put you in jail, they don't do that, they come to the hotel and say, "Here, you didn't have any lights; here is a fine, five or six or seven marks," whatever it was, and you would pay it, and that is all there was to it. That is all there is to it. He guessed he expressed himself in hostility to that. In Hanover they never hurrah for the Kaiser. Hanover was pretty bitter. He and his boy companion were arrested for singing a song on the street about Bismarck. They put them in jail. They could not do it. He remembered that well, in the '70's. They kept Bismarck's picture in a back place, some place. They became Prussian after witness was born, he thought four or five months, he didn't recall. He did not know that he ever found fault with the Food Department. He didn't think he ever discussed with Mr. Titus that part at all. He had some discussion with him in a talk. That was after he got back from South America, an early stage of the war, when the war commenced between [205] Prussia and France and England. They never discussed any food at that time. There was no Food Administration at that time. The food condition he never discussed with Mr. Titus because Mr. Titus didn't know anything about it. He might have talked to him about whether America was being influenced by the British press. Something to that effect. He would not be sure if he did or didn't. Defendant is not much of a newspaper reader. He never reads articles clear through, as a rule. He reads the headings, headlines, that is about all. That

(Testimony of Henry Albers.)

was so even during the war. He might have explained to Mr. Titus about the Prussian army. He told him about how they were trained, how the system was there. He never did express the opinion that the United States soldiers would not stand much chance with them fellows. He never had any heated discussions with Mr. Titus. He didn't see Titus in his office. In the morning defendant's brother would go out to the mill and defendant would go to the office, since they had an office up town here. Defendant got down to the office about nine o'clock, sometimes eight, sometimes seven, sometimes ten. Defendant's brother would come up to the office at noon, at lunch time, and defendant would go with their hayman—what he called their hayman, looks after the hay department, down to the mill and stay there a couple of hours and look after everything and go back to the office and go home. Defendant goes through the mill and through the upper dock and goes through the lower dock. Titus was on the lower dock at that time and once in a while a telephone would ring and defendant would answer the telephone. Once in a while Titus was there. Nine out of ten times Titus wasn't there at all, because he would leave for town at half past eleven [206] go to the bank and see some customers, and he would never come back much before half past three or four o'clock, about the time defendant left. A good many times defendant met him on Front Street near the steel bridge. Once in a while he saw Titus on the dock. Titus is always on the lower dock. The

(Testimony of Henry Albers.)

American-Hawaiian office was vacant after we went into the war. The Hawaiian dock was packed full of Government supplies. There was Government supplies every place, practically all over the place. All these docks were covered with Government supplies. At that time—after we entered the war, there was a lot of supplies there. He could not say exactly, but a good many million dollars there now and been there ever since we entered the war. Yes, many thousand tons of stuff of all descriptions. All Government war stuff, everything. They got practically three-quarters of their (Albers Brothers Milling Company's) warehouse and dock space. Practically all filled with Government supplies. He didn't think he ever had a talk with Mr. Titus after we went into the war. He met him in the elevator. Titus would come to their office once in a while and say good morning, good day, something like that, that was about all. That is right. He talked to Mr. Titus about some coal after we went into the war. He talked with Mr. Titus when they had the "Oakland" loaded to send to San Francisco. The schooner "Oakland" they salvaged off the beach on the "Manzanita," the captain came out and says, "We need coal," as they wanted to go out the next morning. Defendant knew this Titus had coal then on the dock, on Dock Three, and he went over to Titus and he says, "Have you got coal? Where does that coal belong?" Titus replied, "Yes, I will let you have that," and he gave the price and defendant said all right. That was March 28, or about the 30th.

(Testimony of Henry Albers.)

He could not say the [207] day, but it was the latter part of March, 1918. Defendant was not in Portland at the time fixed by Mr. Titus when a conversation was held in the American-Hawaiian office. About July 20, 1917. Defendant was in California because that was in the high water stage of the river and defendant remembered he was not here at all. He came back after the high-water was gone, and Titus had moved back to the same office where he always was. When defendant went away Titus had not moved up to the Hawaiian-American dock. He only knows Titus was up there because he said he was up in the American-Hawaiian office. Defendant don't know that he was ever there at all. In any discussions he had with Mr. Titus defendant never did try to persuade him to do anything. He guessed they discussed about the war. Sometimes Mr. Titus took issue with defendant on opinions defendant had. He could not recollect what they were, but he would not have any talk with him, if a man don't talk back. If a man don't talk back you simply stop and go away. They never had a dispute that he knew of. Mr. Titus was always friendly, as far as defendant knew, and perfectly agreeable. Mr. Titus might have remonstrated with defendant before we got into the war, about some of defendant's opinions or views or remarks. He must have been pro-English, else they would not have had any discussion. Defendant did not know that he had any antagonism to Mr. McAdoo, the Director General of Railroads and the Secretary of the Treasury. Defendant never had

(Testimony of Henry Albers.)

any trouble with the railroads, under his administration. He didn't recall talking about McAdoo at all. He didn't see why he should say that McAdoo was a son of a bitch. He hadn't done anything to defendant. He didn't think he ever did kick about the way he ran the railroads. [208] Of course he travels a few times, he always gets there. He didn't think he ever discussed, did not know that he ever discussed the subject of whether America was influenced by the British press to take the position it did in the war, or that defendant thought the United States had no cause to attack Germany. He didn't think he ever, at the time he talked with Mr. Titus, expressed the opinion that a revolution might occur in the United States within a short time, or at least within ten years. Didn't recall that he had a talk with anybody about this revolutionary stuff, not that he knew of. Never did entertain some notion about that, that he knew of. He didn't know anything about any revolution. Did not think there would be a revolution. He never did at any time, either before or after the United States entered the war, express any sentiment or make any statement, even intended to or calculated to show lack of allegiance or lack of fidelity or lack of attachment to its cause, at no time. He was naturalized he thought in December, 1900, and he has been a citizen of the United States ever since, but voted regularly at elections. He voted here before he took out his second papers. Out of all the mills one hundred and two boys, he thought, went from the firm into the service. He

(Testimony of Henry Albers.)

wasn't around the other mills, only two or three times a year. But he was here practically every day when he was in town. He thought eight—seven or eight men went out of the office, and out of the whole plant 46 or 48. He didn't know how many of them were volunteers. He knew there were several volunteers out of the office and they all became officers. All of those out of the office were volunteers but one. Defendant always told them to go in and it would be a good thing for a young man. He believes [209] in militarism. He told them all that they should go in and make men out of themselves. By militarism he means they should go into the army, military training. He advised them all to go as quick as possible. He told them as soon as they came back they would have their positions back and if they needed anything while they were gone to let him know and he would help them all he could. He knew of one boy who claimed an exemption. They called him Archie—Sims, he thought. His mother was old and defendant always told him: "Your mother will get through; you better go." He told him to go into the army and he would come back—he was a little afraid and the rest of the boys joshed him and defendant told him he would better pack up and go. He was claiming an exemption on account of his mother. Concerning Liberty Bonds and the other war activities, they had a meeting for the Albers—they generally have a meeting once a week, maybe not all the directors, and they took up this matter and it was decided on buying so much, whatever we could stand, and defendant

(Testimony of Henry Albers.)

recommended to buy that certain amount. He never did try to obstruct or prevent any of these things and never did try to obstruct or prevent any man from enlisting or going into the army. He thought practically all of them who enlisted there came to the office after they got their uniforms on, to bid defendant goodbye; practically all of them. He never did tell a single one of these fellows to do anything disloyal or insubordinate. He told them to go ahead and get through with it. He thought practically all of these men that went out of the office, except one, are officers now. All made good men.

On cross-examination the defendant testified: Such education as he received in school he received in Germany [210] prior to coming to this country. He didn't attend school after coming here, never. He engaged in milling in America for the first time in '95. That is when he left the employ of the McKay Building, and from that time on he has been in the business every day. And the Albers Brothers concern now has plants in Bellingham, Seattle, Tacoma, Portland, San Francisco, Oakland and Odgen. All these plants are owned by Albers Brothers Milling Company, only one corporation. Of that corporation was the president until this occurrence occurred on the train. He had been president from the beginning, since the Albers Brothers Milling Company started. Not before. Before it was Albers and Schneider, or the U. S. Milling Company. Defendant and his present brothers control the corporation. They own and control the stock. There are

(Testimony of Henry Albers.)

several outside stockholders; some of them pretty fair amounts, others small. He could not say that there are any stockholders outside of the Albers family that own as much stock as defendant or his brother Will. He thought there is one family in San Francisco, the Denman family. They are heavy stockholders. They don't own the control, however. Defendant and his three brothers, Will, George and Frank, do control the corporation. They are all on the board of directors. When defendant returned to Germany in 1901 he was there about two months and a half. In his home town. In Germany, where he was born. He traveled around; he went to Russia, Switzerland. That time he had his sister with him. He was abroad that time about two months and a half. He returned to Germany in 1912 for a visit and was there that time about two and one-half to three months. He went to Alsace Lorraine, Switzerland, and [211] he was a little ways into Russia and came back to his home town. He was just over the border in Russia from Posen, in Rechan. Had a friend living there. He was there only three or four days and went back. After he left Germany he returned directly to New York. Stopped there a few days, Chicago, and then back home. When the war broke out in 1914 he was in South America in the Argentine. He left Portland in the latter part of May, was in New York three days then took the steamer and it took them twenty-five days to get there. He returned to Portland from that trip in September. He arrived in Argen-

(Testimony of Henry Albers.)

tine, he thought, about two weeks or ten days before the war broke out. He left the Argentine, he thought, about a month or five weeks after the European war broke out. At that time he was in Brazil a few days, when the steamer was stopped there. He thought the steamer was lying there five days. He went there with a friend that knows that country pretty well and he wanted to see the conditions of that country. He went to Trinidad and was in Trinidad, Port of Spain and Barbadoes and Rio Janeiro. He just went there with a friend, because he was in the grain and flouring line, too. He went to see what was going on there. He went to Bahia, that is Brazil; Rio Janeiro and Santos, a big coffee house there. He arrived back in New York the latter part of August, was in New York five or six days, he thought; could not say exactly the time. He visited the Grain Exchange and Albers Brothers Milling Company's agent. They had an agent there at that time. Now they have an office there. He didn't recall, didn't remember the name of the agent. He guessed the agent is still in New York. They have an agent down there now, their own office. At that time they didn't [212] have it, they had a strange agent. He visited nobody else in New York that he knew of. He didn't visit the German Consulate, don't know him. Didn't visit nobody. He did not meet the Consul or any of his representatives in New York, not a one. From New York he went to Chicago and stayed there four or five days. He didn't remember. He just went in and saw the mill-

(Testimony of Henry Albers.)

ing people there and the grain people. All the business he had was in machinery houses. He visited Quaker Oats Company, a man named Stewart—he knew him pretty well—and a machinery house by the name of Rich and Gump. He thought Rich's initials was G. He didn't know what initial it is. He was there several times, he could not exactly say how long. From Chicago he came straight to Portland. This man Rich he visited in Chicago is a machinery man, makes special machinery for oat purposes. B. Rich is his name, correct. Defendant didn't know anything about his financial connections. He knew every time they bought a machine they had to pay the money right away. He didn't know anything about whether Rich was connected with the Trans-Atlantic Trust Company. He didn't know whether the Trans-Atlantic Trust Company was the company that was dealing direct with the German Foreign Office. He didn't know whether Mr. B. Rich was the active agent of it. The man Rich he knew had a little two by four office in an old building and had his own machinery. He is an old man. Defendant thinks he is dead now. Seventy or eighty years old. When defendant left Chicago after four or five days he came directly to Portland and made no other stops. That brought him home some time in September or October, 1914. Defendant hadn't been east at all since that time. He was not in the east in 1915, nor in 1916. [213] He was sure of that. Never had any business in Baltimore; never was in Baltimore. Didn't think he ever told anybody he had

(Testimony of Henry Albers.)

been in Baltimore, because he wasn't there. Sure, his brothers had been east since 1914; his brother George had been back there and his brother Frank, in New York. Frank was there once or twice. He was there some time ago, defendant guessed. There a year ago. They generally make a visit to the New York office once a year. One of them. It might be the company erected a small warehouse up in Union County in the summer of 1916. Defendant thought it was in 1915. At Haines, Oregon. He was there a month. He stayed at the Hot Lake Hotel at that time. He never had any conversation there with a man names Haines, not that he knew of. He didn't know any Haines up there. He did not at that time discuss a recent trip to Baltimore. Never, no. He did not tell Mr. Haines that he had gone to Baltimore when the "Deutschland" came in, nor that he had met the captain and officers, and never told him that he had been over the "Deutschland," Never told him. He had no such discussion with anybody up there, in Hot Lake. He didn't tell Mr. Haines or anyone else that he had gone to Baltimore, had met the "Deutschland" when it came in and had met the officers and the captain, Captain Koenig. How could he? He wasn't there. He was at Hot Lake in September to build a warehouse. He was there practically all through the month of September, and he had never been to Baltimore, never in his life. It was in 1914 that he was in the east. He thought he spent most of the time in 1915 in Portland. Yes, he recalled being away from Portland in 1915. He

(Testimony of Henry Albers.)

had been in Frisco in 1915, he was in Los Angeles, but he could not recall the date. Most of the year was spent [214] in Portland; yes, sir. In 1916 he was in Frisco a couple of times. He could not say without looking it up what months he was in San Francisco. He knew he was in Portland on the 18th day of April. No, 1917. 1916 he was in Portland. He thought in the fall of the year he was in San Francisco; in November and December, he thought pretty near up to Christmas. In 1917 he spent most of his time in Portland. He was in San Francisco a few times. During those two years he stayed some place for a week, others two weeks, others a month, and then moved on again, but he visited all of the Albers plants during these two years rather constantly. He stayed in Portland about a month at a time. Yes, he had several conversations at the Board of Trade or the Grain Exchange; he could not recall every one of them. He knew there was talk about the war several times. It was mostly in 1914, after he came back from South America. He went to the Exchange frequently after that. After we got into the war he never went to the Exchange. He didn't think he was ever there once. In 1914 or '15 or '16 he was at the Merchants Exchange a good many times. And he might have had a number of arguments there with the various people about war conditions. He had some talk about the war. He didn't think it generally started and finished by defendant championing the cause, somebody else taking the Allied cause. He might sometimes have taken the Allied

(Testimony of Henry Albers.)

cause, yes. Could not remember the date that he ever took the Allied cause and he could not recall any instance when he did. He thought he took the Allied cause at the time Germany invaded Belgium. Well, sure he took the Allied cause then. He thought that Germany never had any right to go through Belgium. He never did [215] bet on the Emperor having his Christmas dinner in Paris. No. Never made a bet of that kind with anybody. He was sure about it. Oh, well, it was just in a joshing way, you know that somebody or some men called defendant Hindenburg. Oh, no, no no, they were not calling defendant General French or Marshal Foch or anything of that kind. No, they never did that. He referred to the other parties as Haig or Kitchener, something like that, when they addressed defendant as Hindenburg. He generally put something like that back again. If he mentioned General Haig's name it must have been after he became Commander. He thought General Haig became Commander in Chief in 1916. It was pretty hard for defendant to remember what year or years he had those talks with Mr. Titus, because defendant went to the dock frequently when he was here. Walk through it and he didn't think that he talked more than once or twice with Mr. Titus, because he wasn't there most of the time. He talked with Titus the time he bought some coal from him. He might have talked with him other times, but not that he knew of. So far as he knew he was on good terms with Titus at the time the war broke out. He never had any dispute with Titus, and he

(Testimony of Henry Albers.)

thought those good terms continued for some time. Defendant never knew that relations became a little strained later. Never did, that he knew of. No, he didn't remember having talked to Titus about reports of the German atrocities as being false. There is no personal matter that would cause Mr. Titus to lie about it, that defendant knew of, except this coal matter, maybe. He didn't know. There was some dispute about the coal matter, because defendant told Titus they had a boat lying there that had to go out next morning. He had to get the coal in her—the captain had to go out. Defendant asked Mr. Titus if he [216] had coal, Titus says yes, it was his coal. Defendant says, "Whatever the price is, get it ready and we will put it in the ship," and then defendant told him to collect the money in the office, whatever it was. Defendant didn't know where the coal belonged to. Mr. Titus was on the dock and took care of that coal. That was the latter part of March, 1918, and prior to that time there was no reason he could recall why Mr. Titus should have misstated any facts about it. He could not exactly say how the bill was paid, but there was some dispute about that bill. He thought at that time Titus owed money to the concern and they wanted to deduct it out of the bill. There was some dispute about it that the Secretary or their cashier, maybe, can explain better than defendant can. Defendant is not very familiar with the books. Don't attend to that part of it. Whatever difference there was, it was after March 1, 1918. He

(Testimony of Henry Albers.)

never did have any conversation with Mr. Titus to the effect that America had no cause for going into the war. He did not remember having a conversation to the effect that we could never lick the Kaiser. Never said that. He did not recall having had a conversation with Mr. Titus in substance wherein defendant made a statement that all the institutions of the United States were inferior to those of Germany. He did not recall discussing the Food Administration to Titus at all. No, never. No, he never made the statement that the United States Food Administration was outrageous and ridiculous and that it was no good. He did not know that he ever made the statement to Mr. Titus that the United States and its citizens are dominated by the British press, meaning the English papers. Defendant could not think that. He didn't recollect that at all, that he ever talked about it. He didn't think he ever thought [217] anything about that. He wasn't a very constant reader of the papers. He read most any papers that came along. Most any paper that comes along. Nothing of any paper particularly, he read the headings and that was about all there was to it. He looked at the headings of the "Oregonian," the "Telegram" and the "Journal" pretty near every day. He has read the "Nachrichten." No, he is not a very steady reader of that paper. At one time, years ago, before he could make himself clear in the English language, yes, he read the German paper. After the war broke out in 1914 he was not a steady reader of that paper. He got the paper

(Testimony of Henry Albers.)

once in a while because it was sold on the street, and he bought it. He is not a subscriber to it. He was at one time, yes, some years ago. He got his war news, or the news concerning the war, from all the papers. Some of it was the "Oregonian." From all the papers. He never got the paper in the mill office, the German paper, at that time, because he didn't have no time to read the paper, was so busy in the mill. All he had was a little place. It is only room for one table, for one desk and a chair. He never saw the Italian that was on the stand the other day, Cerrano, in his office. He could not say that Cerrano wasn't, in so far as there are so many people working—he could not. Up here in the Railway Exchange Building he had a German paper there which was delivered to him. The "Nachrichten." That is all the German paper he received. He doesn't take the "Staats Zeitung," of New York. He did not take any German papers into Mr. Titus' office that he knew of. He might have one in his pocket. He had a paper sometimes in his pocket. Left it there if Mr. Titus wanted to see it. He did not know that Mr. Titus asked to let him see it. He didn't think Mr. [218] Titus could read German. He didn't know. He had no idea if he could or not. No, Mr. Titus didn't ask him to leave the German paper there, sure not. He never did tell Mr. Titus that the place to get the news of what was going on in the war was to get it from the German paper. He never did make a statement to Mr. Titus that the United States soldiers were a bunch of amateurs and

(Testimony of Henry Albers.)

would have no chance against professionals like the Germans and that they made a mistake in attacking Germany. He never made such a statement as that, no, sir. He never did discuss revolution with Mr. Titus. He never discussed that with anybody. He was sure of that. It seemed to him that way—that these witnesses who have testified that defendant did, they sort of conspired against him. Mr. Titus might have joined in that conspiracy; he didn't know. He would not say that for sure. Owing to the talk Mr. Titus made defendant rather thought so. Yes, he remembered that man (David McKinnon) for a good many years. He used to sell babbitt for a company in San Francisco—babbitt for bearings. He never talked to that man in Frisco that he knew of. He met him here in Portland; came into the office frequently. He did not know that he had any talks with Mr. Titus after we entered the war. The only time he knew he talked to Titus was when he asked him about the coal. Never had any discussion about it at all. Asked him if the coal was any good for cooking purposes and stuff like that. Asked him the price. That was all there was to it. He did not have any discussion with him about the war at that time. No, never talked to him. Nor at any other time that he knew of. He didn't know whether Titus was pro-Ally or pro-English. Didn't discuss that question with him. Before the United [219] States entered the war defendant was in sympathy with the German people but never with the Prussian government in his life. Never was, no, sir. He did

(Testimony of Henry Albers.)

not have anything against the English, because they never harmed him any that he knew. There might have been some talk as between the British and the German cause in the conduct of the war prior to the time we went into the war. He didn't know; he didn't remember. There was a lot of war talk. He didn't recall that he ever talked anything about the English people. Or about the English government or the Allied governments. No, he never did. He knew the German militarism was pretty strong. Also he may have said that the German cause would prevail in the war because he knew the German military. He never made a bet to that effect, that the German cause would win. He was pretty sure that he never put up a penny in his life on a war bet with anybody. He had never discussed with anybody prior to the time we went into the war or afterward the likelihood of a revolution coming on in this country. Never mentioned that to anyone. The boat "Oakland" is the one they salvaged over at the mouth of the Nehalem River. No, he did not remember Wardell, the man that said he was working for the District Attorney at Tillamook County. Defendant knew they were in that soft drink place. They played a couple of games. That was the time they wanted to launch the boat and they didn't have no flag and defendant asked the man if he could not give them a flag—they could not buy a flag in Wheeler. The man finally gave this flag and they sent it out there a couple of days afterwards. De-

(Testimony of Henry Albers.)

defendant never talked to Wardell, never saw the man that he knew of. He didn't discuss the submarine question with anybody there. He did not express any opinion that as soon as Germany got her submarines started there would not be a single [220] boat from the United States get to Europe. He recalled being at the Sutter Hotel in San Francisco in the early part of 1918 with John O'Neill. He didn't know anything about the Sunday they took a ride down to Stanford University, Palo Alto; didn't remember that. He was in the barber-shop once, he remembered that, but when that was he didn't know. He didn't recall talking to anybody there, any young lady who said she came from Oregon. He did recollect something about a young lady, her home was in Milwaukie, there was a lady in there came from Milwaukie, because she asked him about Milwaukie, and defendant talked about Milwaukie with her. Various people were not mentioned that were known to both of them, because defendant had only lived a little while, he hardly knew anybody, he only knew the banker and the station keeper. Streib he thought was the banker. That wasn't the day they took the ride down to Palo Alto. He didn't think it was. He knew he talked to the young lady there. Yes, sir, he raises China pheasants. Yes, he might have discussed with Miss Gomes or some young lady in the barber-shop or some other lady in the barber-shop at the Sutter Hotel the pheasants he had at home. He might have discussed something like that. They may have talked about birds and stuff like that, yes. As

(Testimony of Henry Albers.)

to those two things Miss Gomes might be correct. He didn't know when he was there. She might be correct. He didn't know, he didn't remember anything about the trip down to Palo Alto. Later he stopped there for two weeks; three weeks at a time, sometimes. He may have walked through the barber-shop, he did that sometimes, walked through the barber-shop. Sometimes he walked through the bar-room. No, he had no recollection of going with Mr. O'Neill and Miss Wade and Miss Gomes in an [221] automobile out to Palo Alto. He had no recollection of saying to her that "I am a Kaiser man from head to foot." No, he had no recollection of saying to her that "I am a millionaire, and I will spend every cent I have to help Germany win this war." No, he knew he wasn't a millionaire. So he could not spend it. He didn't think he said it. He did not recall having said to her, "I am for Germany, and I am willing to die for Germany at any time." Didn't believe he discussed the Kaiser with her or that he told her the Kaiser was the greatest man in the world, no, sir. He did not discuss President Wilson with her. Nor compare President Wilson with the Kaiser in discussing the matter with her. He never had any war talk in Frisco. He did not discuss the matter of an impending or oncoming revolution in this country, no, sir. He thought Miss Gomes also entered into the conspiracy with these five men on the car, and Mr. Titus, about this revolution story. He thought she entered into a conspiracy with them to misstate the facts about it. He could not say any-

(Testimony of Henry Albers.)

thing about it, whether she conspired before that time with these other gentlemen. He knew he never had any war discussion with that lady at all. And he was positive that he didn't discuss them with her. He thought he was in the barber-shop a couple of times. They never talked about a bank in Frisco. He had some recollection that he talked about Milwaukie. He didn't know when it was. He had been there half a dozen times. He always stops at the Sutter Hotel. He didn't know when it could be. She said the 18th or 19th; he was in Portland on the 18th, he knew that. He had discussed the China pheasants with people; he didn't know with whom. If Miss Gomes says she discussed it with [222] him he might think she was telling the truth about it; he didn't know. He knew he had China pheasants, peacocks and all that kind of stuff down there. She might be telling the truth in those two particulars; he would not say anything about that, of course. He didn't know anything about the discussions concerning the war which she says occurred the same day, and a portion of it at the same time. He left San Francisco on the night of the 7th of October, 1918. Came up on the Oregon Limited, the through train. He met Lot Swetland on the ferry, yes, sir. They walked together from the Mole to the train. He didn't know if he ever did talk to Lot Swetland after. He knew he talked all from the ferry boat across the bay, he remembered that. He had a few drinks before he left San Francisco. He guessed he was sober. He didn't remember when he went to bed; could not say anything about that.

(Testimony of Henry Albers.)

He didn't remember anything about that; he talked with Lot Swetland, while on the car, before he went to bed. If Swetland testified that after he, Swetland, got on the train he saw defendant in the observation-car, defendant thought he might have been there; he didn't know. He could not say anything about Swetland's testimony as to defendant's condition. He didn't remember anything since he got on the train. He could not say anything about whether he thought that Swetland is not telling the truth about that. He didn't know when he got up the next day. He didn't know that he had anything to eat on the train. Didn't recall that. He did not recall being in the small washroom, the smoking room at the end of the observation-car, during the early evening. He wasn't in there at all that he knew of. He never knew any one of these men who have testified they saw [223] him in there and talked to him. He never heard of them, except he heard it before when Mr. Goldstein explained it to him when he was up to his office one time. That was after defendant arrived in Portland. Prior to that time he had never heard of any of these men. He don't know Mr. Watkins, the Special Agent. He didn't recall anybody that he saw in the sleeping-car after he got up that day, didn't remember that he saw anybody. And he didn't recall anything that happened that evening. He got up in Portland next morning, he knew that. He did not recall that clearly, he thought the porter told him to get out. He thought he went home when he got off the car. When he got home he

(Testimony of Henry Albers.)

was all right, he went right to bed, he was kind of sick. His home is out at Milwaukie. He didn't remember any conversation with this Mr. Kinney in the car. He never met Mr. Kinney before. He didn't know that he ever met that man, because he had not got much chance of meeting any of the salesmen. He did not know that he had any discussion with him in that smoking-room that night as they came up after leaving Ashland or Medford, going towards Roseburg. No, he didn't recall saying to him that "Once a German is always a German." He didn't think he ever talked that way. He never said that they can never lick the Kaiser. He could not say what would make him say there would be a revolution in this country, maybe in four years, possibly in two. He didn't know anything about it. He didn't think he ever said anything like that. No, sir, he never made the statement he could take a gun himself and fight right here. Never had a gun in his life. Didn't know anything about telling Mr. Kinney he came here without anything and he could go away without anything. There was [224] no feeling of enmity between Mr. Kinney and himself that he knew of. Of course, he didn't know the man. Didn't know that he ever met the man in his life. Didn't recall telling J. A. Mead, "I am a German, and don't deny it. Once a German always a German." He didn't remember anything that he knew of in the car. He never said, "They never can lick the Kaiser in a thousand years," he didn't think, because he didn't recollect anything on the train. He didn't know any

(Testimony of Henry Albers.)

reason why this man, who didn't know him, should come in and tell an untruth about it. He never met Mr. Bendixen. Never saw the man before he was on the witness-stand. Defendant met his uncle, Peter Bendixen, in Los Angeles, yes, sir. His uncle is a stockholder in defendant's concern, or was. He did not recall any conversation in German or English with Bendixen in the train that night. He did not recall saying to him, "Once a German always a German." He didn't remember anything that he said to Bendixen, or anybody. He never would say, "While I am American on the outside, I am German in heart." Could not. Didn't say, "To hell with America." No, he would never say that word "schlag." "Schlach" does not mean to destroy; no. It means to strike and fire. Yes, knock-out means more than the two words knock and out. It means to finish a thing, to terminate. No, schlach does not have in German the same kind of an extended meaning. It does not mean to strike to the finish, to end to terminate to settle, to obliterate. No, that is schlage, not schlach. No, he never did make either of those expressions to Bendixen. He didn't recall talking to anybody who spoke to him in German in that car that night. He didn't remember anything on the train. It is a blank to him. He didn't [225] remember telling Bendixen that he knew what he was doing after Bendixen made that remark to him. He would never say, "I have helped Germany and I will give all I have to the Kaiser if I have a chance." The Kaiser was never a friend of his. He didn't

(Testimony of Henry Albers.)

remember anybody asking him how he intended to help the Kaiser. He didn't know anything about it. He did not recall making an explanation. He did not recall having said to Bendixen, "I would be willing to go back now and fight for the Kaiser." Or that "We have already won the war." He did not say that. He never said that "There will be a revolution in the United States, probably in four years' time, possibly in two years' time." He never said that. He don't know any reason why Bendixen should have a personal feeling against him to the extent that he would come in and tell an untruth about defendant's having said these things. He had no idea. He didn't recall meeting Mr. Tichenor in the smoking-room. He didn't know Mr. Tichenor. He did not recall anybody there who told him to put up a bottle that was setting at the side of his chair on the floor, or else setting on a bench at his side. He didn't remember that he was in the smoker; he didn't remember that he was even in the smoking-room. He had no idea what time he went to bed that night. No, he didn't know he was in the smoking-room at the time he got up to go to bed. He didn't know how he got to bed. His mind is a perfect blank as to what happened, and is a perfect blank as to what happened when Miss Gomes testified he took the trip to Stanford. He didn't see Wardell at Wheeler. He didn't see him there that he knew of. He didn't meet him. And as far as Mr. Titus is concerned, [226] the only thing defendant could remember saying to him is the discussion that arose at the time they were

(Testimony of Henry Albers.)

negotiating for the coal. They didn't have any war discussion then there. They had war discussion in the early days, maybe some discussion, but he didn't remember. He never said the things to Titus that the United States attorney is asking if he did say to Mr. Titus. He didn't know Franz Bopp. He didn't know no Bopp. Does not know a man by the name of von Brincken. Don't know him at all. And doesn't know Bauer. Never saw him, he thought. Nor von Goltzheim, nor Daniel O'Connell, nor Robert Appellee. Never saw him. Nor Herman Kauffman. No, sir, he never told anybody that he was a German and his brothers were German. He knows the Deutches Haus at San Francisco. Had been there once. Maybe a little while after it was finished. Two or three years ago. They had a kind of show there, He was there once with his brother. It was either after the war, or just before the war started, he could not recollect. He knew he was in there once. We went in a little while, went in the bar, had a drink and went home. He didn't know whether his brother is a member of the organization that meets there. The defendant has never been a member of the organization that met there. He didn't know whether those names that counsel had just read over to him are either officers or frequenters of that organization. Oh, yes, now the United States Attorney has mentioned that one of them was the German Consul in San Francisco, he remembered Bopp. He knew he was German Consul. It was in the paper. Defendant never met the man—never saw him in his life.

(Testimony of Henry Albers.)

Never met any of those men. Defendant is not an associate of those men, no, sir. No, he never said that [227] he was pro-German and his brothers were pro-German. He didn't know whether his brothers belonged to that organization. He knows a man named Voss—Clem Voss. He is foreman in the Del Monte Milling Company, owned by the Albers Brothers Milling Company. Yes, it is one of their smaller plants. That plant is out of existence now. He didn't know whether Clem Voss was a member of this organization that met at the Deutsches Haus. Defendant never put up a cent on the outcome of the war with anybody that he knew of. There was a lot of talk during 1914, '15 and '16 and until the early part of 1917, when they went to get a shave—"I bet you grain will be up to-morrow"; "I bet you this"; "I bet you that." He never put up a cent in his life about the outcome of the war. He never bet with Cushing. He only met Cushing about once, or two or three times a year, maybe. He didn't think he ever asked Cushing to bet with him on this question. He knows Jack Noyes. Never made any bets with him about the outcome of the war, no. He was pretty sure that he never made a bet with Jack Noyes. No, he didn't think—it must be way back, but he didn't remember anything about it. It is so far back that he didn't know that he ever did make a bet with Noyes in the fall of 1914 as to the date when the Germans would arrive in Paris. He might have, he would not say. He would not say that for sure, that he did do it. If he made any bet with Noyes along

(Testimony of Henry Albers.)

that line it might have been favorable to the Germans, with a view of the Germans winning. He didn't know. If he made this bet with Noyes he didn't know whether it was after the invasion of Belgium. He didn't recollect that at all. If he made any bets with Noyes he could not remember whether they were made after Belgium was invaded [228] in 1914. He could not remember that far back. Defendant's concern as started in 1885 down on Front Street, or First Street, was rather a small business for a few years. It picked up and became a pretty good-sized business about 1904,—'05—'03. Bought other mills with it. A substantial part of the start in the business was made in handling grain and hay contracts for the army in the Philippines. It was hay baling and several other things that put the business on its feet. Albers Brothers made money out of every line; they made money in milling. He is not a stockholder in any newspaper. He had some stock in the "Nachrichten." Disposed of that some time ago. Not very long ago, maybe a month ago, three weeks. He knows Kern, the manager of the "Nachrichten." He is business manager. He does not know Ernst Kroner, until recently, the editor. Does not know *a* one of the management up there. Did not know Max Lucke; might have met him; aside from that he did not know him. He would not know him. Defendant never was at a meeting. He had a few shares of stock. He didn't remember what happened to Max Lucke. He knew he was in trouble once, but he didn't know. He knew he was in trouble

(Testimony of Henry Albers.)

about some war measure, he didn't know what it was, never followed it up. Never knew Max Lucke was interned by the Government as a dangerous alien enemy. Never knew he was put in a prison camp. The paper is not defendant's paper. He wasn't a contributor to a single other paper aside from being a subscriber. He did not know the "American Independent," a San Francisco paper. He might have read it when he was there. Didn't know anything about who owned and controlled it. He did not know the "American Independent" was organized, printed [229] and disseminated by Bopp. Didn't know that all that crew of disloyal Germans that were arrested and tried and convicted in connection with those Hindoo affairs in the United States Court in San Francisco was the owner of this paper. Defendant did not contribute a cent to it, and his firm was not a contributor that he knew of. Not a cent that he knew of. He should know if it was, but he don't. His firm was not a contributor to that paper that he knew of.

Thereupon defendant rested.

**Testimony of Mrs. Eva T. Bendixen, for the
Government (In Rebuttal).**

Thereupon Mrs. EVA T. BENDIXEN was called as a witness in rebuttal on behalf of the Government, and having been first duly sworn testified as follows:

That she was the wife of E. C. Bendixen and lives here in Portland. She knows Wesley Nippolt and recalled a visit made to her home by Mr. Nippolt

(Testimony of Mrs. Eva T. Bendixen.)

some time in the early fall of 1918. He had been there a good many times but he wasn't there on the 10th of October. She was sure of that, because Mr. Bendixen was not at home at the time. Mr. Bendixen had been gone for about four weeks or more and came home on the 15th day of October. Shortly after that Mr. Nippolt was at their house. Mr. Nippolt and Mr. Bendixen had a conversation at that time concerning the Albers matter. Mr. Bendixen did not say, "I have fixed my uncle's stock plenty. You know Fred Jacquelin. Tell Jacquelin to get rid of his stock, for it won't be worth much for a great while longer," or words to that effect. He made no such statement. Mr. Bendixen did not make the remark that he trapped Henry Albers. Mr. Bendixen did not say at that time that before he would go into the room where Henry Albers was that he made an agreement with Frank Tichenor, [230] that he could drink as much whiskey as he wanted to without being charged with any criminal offense, nor words to that effect.

Thereupon witness was asked the following question: Q. Now, what conversation was had at that time, if any, between Mr. Nippolt and Mr. Bendixen and yourself concerning the Albers arrest or the Albers case or the charges against him.

Defendant thereupon interposed an objection to said question as follows:

Mr. McGINN.—I object to that, your Honor. That is hearsay testimony brought in here. It is railroaded in here, it has no right here. They have

(Testimony of Mrs. Eva T. Bendixen.)

met the testimony, they have denied it and that is all there is here.

Upon defendant's said objection the Court ruled as follows:

COURT.—As to one of these questions that was asked the witness, she started to explain and was not given a chance to explain after she said the thing did not occur. I think she should have the right to explain it.

Defendant saved and was allowed an exception to the foregoing ruling of the Court.

Thereupon the witness testified in response to said question as follows:

A. Well, the conversation came about regarding the case, and the fact that Henry Albers had made seditious remarks and that Mr. Bendixen had been asked to go in there and find out whether he really was a pro-Hun or not, and in regard to the matter about the drink it came up in this way: That he told Mr. Nippolt just how it came up, that he felt kind of, perhaps, that if Mr. Albers would offer him a drink it would be all [231] right for him to take it; that he felt it was his American duty to go in there, if these remarks had been made, to see if it really was so, but he told Mr. Nippolt—

COURT.—He told that to Mr. Nippolt?

A. Yes, sir, and he told also to Mr. Nippolt that it placed him in a very peculiar position because his uncle was interested in the firm and that his first thought was probably he should wire his uncle and then again he thought it would bring a reflection in

(Testimony of Mrs. Eva T. Bendixen.)

some way or other, that he better leave just everything alone and do his—he made the remark in one way perhaps when he couldn't go to war—

COURT.—Mr. Bendixen has testified to that.

Q. But he made no remarks that he trapped Mr. Albers, but he simply said that as his American duty he would—

Mr. HANEY.—That is all.

On cross-examination the witness testified as follows: Mr. Bendixen did not say that inasmuch as he could not go to war he would do his bit that way. He said that it was destined, maybe, that was the way he was doing his bit in finding out a pro-Hun. She could not recall that Mr. Nippolt came back to her house at a later time. He went to Tacoma the following Sunday after that.

Testimony of J. A. Mead, for the Government (In Rebuttal).

Thereupon J. A. MEAD was called as a witness in rebuttal on behalf of the Government, and having been previously sworn, testified as follows:

When he left Los Angeles to go up to Canada he had a card, or letter, from I. S. Hurst, of Los Angeles, California, who used to be a resident of Portland here. Was in some way connected with Thiel's Detective Agency. Has been for years, he understood. Witness went to Wyoming for Mr. Hurst and his associates in charge [232] of an oil property four years ago, and has been very friendly ever since. At the time witness started on this trip

(Testimony of J. A. Mead.)

it was told to him by some authorities down there that it might be necessary for him to have some special identification when he wanted to come back into the United States from Canada. He then went to Mr. Hurst and requested a letter of introduction from him to the manager of the Thiel Detective Agency at Vancouver, British Columbia. He then wrote—took out one of his own personal cards, a very small card, and wrote in lead pencil on that an introduction to the manager of the Thiel Detective Agency in Vancouver. And witness suggested to him that perhaps a letter would be better. So afterwards he—that day or the next he wrote witness a typewritten letter to Mr. Reddington. Witness has the card with him in his pocket. He didn't remember losing it on the train. It might have lost out of his pocket. He didn't remember anything about anybody finding it and giving it back to him. He had no card or other writing of any detective agency in his possession of any description except this letter. No, sir, he never was in the employ of a detective agency or connected with any detective agency in any manner except this card of introduction in his life, that he remembered of.

Testimony of D. Y. Allison, for the Government (In Rebuttal).

Thereupon D. Y. ALLISON was called as a witness in rebuttal in behalf of the Government, and being first duly sworn, testified as follows:

He lives at Roseburg, Oregon. Has made his

(Testimony of D. Y. Allison.)

home there and here for twenty years. He is a railroad train man, with the Southern Pacific. Has been with the Southern Pacific off and on for twenty years. At present his position with the company is a brakeman on No. 13 and 54. On October 8 he was called on [233] 54 at Ashland. That is his division. He remembered the occasion when he got on the train at that time. He knows the defendant Henry Albers when he sees him. By sight. He has known Mr. Albers by sight and in a business way for a good many years. Witness lived in Portland since 1888, but as to a business way he didn't know Mr. Albers any more than he had seen him in the city here. The train was a little late getting into Ashland. About fifteen minutes late, he should judge. He didn't recall exactly as to what time it was, how late they were. It usually get in there at four o'clock. This time about fifteen or twenty minutes late. Something like that. He never paid no attention to Mr. Albers until he was at Tolo. Witness came back—in getting on the train he came back to the rear of the train to convey the orders, the movement of the train, to the flagman, and on going to the rear, why, he generally looks for the flagman in the smoking-room of the last car, but he didn't find him there. He was outside, back just a ways. Witness looked in there and seen some gentlemen in there and he didn't pay no attention to them. Everybody seemed to be all right and they was talking, so witness delivered the orders to the train man, to the flagman. This was just a little ways out of Ashland.

(Testimony of D. Y. Allison.)

On arriving at Medford he left the rear of the train and goes back to his station at the head of the train. In leaving Medford, why, he goes back to notify the flagman as to the movement of the train as he had before, and of course he had to pass by this drawing-room, the washroom or whatever it is, and then he noticed there was some little loud talking and he just looked in; of course looking in to his left, he just looked in there and he heard that gentleman over there say: [234] "They can't do it—" He considered the man drinking some, but he didn't consider him intoxicated.

On cross-examination the witness testified that the time of day was about five-forty or five forty-five.

Testimony of Fred Haines, for the Government (In Rebuttal).

Thereupon FRED HAINES was called as a witness in rebuttal on behalf of the Government, and being first duly sworn testified as follows:

That he lives in Harney County and conducts a store at Harney. He spent some time at Hot Lake in the fall of 1916, about the middle of September. He was at Hot Lake for five or six days and went from there to the round-up at Pendleton, which commenced, he thought, on the 20th, 21st and 22d of September. He had a conversation with the defendant, Henry Albers, at that time. The defendant told him that he was in Baltimore when the "Deutschland" came in but he didn't say he dined on board the boat. Defendant said he met the Captain, Captain Konin or Koenig, whatever it was, and some of the crew.

**Testimony of Horace A. Cushing, for the
Government (In Rebuttal).**

Thereupon HORACE A. CUSHING was called as a witness in rebuttal on behalf of the Government, and being first duly sworn, testified as follows:

That his name is H. Cushing and is an officer or manager of one of the seed companies here. The Lilly Company. He knows the defendant, Henry Albers. He had a conversation with Mr. Albers in which defendant offered to make a bet with him concerning the outcome of the war. It was shortly after the Germans declared war against France and Great Britain. He offered to bet witness a thousand dollars to fifty cents, and loan witness the fifty cents, that the Kaiser could lick the world.

On cross-examination the witness testified that this occurred shortly after Germany declared war against [235] France and Great Britain. Witness did not know when Germany did declare war against Great Britain. It was shortly after they went in and war was declared between them. He did not know whether Germany ever declared war against Great Britain. It was shortly after they got into the war. Witness is in the seed business. They are not competitors of Albers.

**Testimony of John H. Noyes, for the Government
(In Rebuttal).**

Thereupon JOHN H. NOYES was called as a witness in rebuttal by the Government, and being first duly sworn, testified as follows:

(Testimony of John H. Noyes.)

He lives at 562 Stanton Street, city of Portland. Lived in the city of Portland about six months. Prior to that he was away for a year in Seattle. Prior to that he lived about four years in Seattle. Was connected with the Globe Grain and Milling Company. Not now connected with that concern. Just terminated yesterday. For the last year he was manager of the grain department. He knows the defendant, Henry Albers. Has known him quite a few years, ten years or more. Yes, sir, as he recalled it, he made only two bets with Mr. Albers with respect to the outcome of the war. The first bet was made in November, 1914. It was a bet of ten dollars that the Germans would not be in London in sixty days. Mr. Albers bet that the Germans would be in London in sixty days. Witness knows one other bet that he recalls, that was in December, 1915, that the war would be over April 1, 1916. Mr. Albers said the war would be over April 1, 1916. One of these bets was paid. He didn't know which one. Both of them were for ten dollars. Mr. Albers lost, of course.

Thereupon defendant moved to strike out the testimony of Mr. Noyes and of the witness Cushing for the reason that it is immaterial and an attempt to impeach on [236] an immaterial matter.

The Court thereupon overruled defendant's motion to strike out said testimony, to which ruling of the Court the defendant duly saved and was allowed an exception.

Thereupon the Government rested.

Thereupon defendant moved and requested the Court to direct and instruct the jury to return a verdict herein of not guilty on each count of the indictment, and particularly moved and requested the Court respecting the Third Count of the indictment as follows:

“Defendant moves and requests this Honorable Court to direct and instruct the jury to find and return a verdict herein of not guilty on Count Three of the indictment.”

And defendant particularly moved and requested the Court respecting Count Four of the indictment as follows:

“Defendant moves and requests this Honorable Court to direct and instruct the jury to find and return a verdict herein of not guilty on Count Four of the indictment.”

Thereupon argument of counsel was had upon the requests of defendant for a directed verdict, as aforesaid, at the conclusion of which the Court overruled the motion and requests of defendant for said directed verdict. To said ruling of the Court the defendant duly asked and was allowed an exception by the Court. [237]

Whereupon, following the argument of counsel, the Court instructed the jury as follows:

Instructions of the Court to the Jury.

Gentlemen of the Jury:

I congratulate you that we are nearing the end of a long trial. It has been somewhat tedious, but you have been attentive and alert throughout the trial, and undoubtedly you have gathered a pretty accurate measure of the force and weight of the testi-

mony that has been adduced here.

After hearing the testimony and giving attention to the argument of counsel, it now becomes the duty of the Court to determine all questions of law arising on the admissibility of evidence, and throughout the trial and its instructions to the jury, and it is your duty to accept as law that which the Court states to you as such. It is your duty, however, and your exclusive duty, to find the facts from the evidence, and with your deliberations in so doing I have no right and no intention to interfere.

The defendant here is to be tried just as any other defendant charged with the commission of crime, and it is your duty, and you should perform it without any feeling of bias, passion or prejudice against the defendant, and with no feeling of favor, sympathy or bias in his favor.

All right-minded persons feel, no doubt, a righteous indignation against crimes like murder, burglary, arson, or similar crimes. Yet when one is put on trial in a court of justice charged with such a crime, it is the duty of those called upon to determine his or her innocence or guilt, not to permit feelings of indignation toward the crime to interfere with or prevent a calm, impartial and judicial scrutiny and weighing of the evidence and a determination from the evidence [238] alone, whether the particular defendant is guilty of the crime for which he or she is on trial.

So likewise in this case: The offenses with which the defendant is here charged are such as can be committed only when the United States is at war, and

during a time of war feeling is apt to be and usually is intense. It is only natural that one should have feelings of righteous indignation during a time of war against any and all forms of disloyalty or seditious conduct tending in any way to oppose the cause of one's own country or to favor the cause of the enemies of one's country. Yet it is needless to say a person charged with the violation of this statute is entitled to be tried and found guilty upon the same kind and character of evidence and in accordance with the same rules of law as apply in times of peace and to other kinds of crimes, and not otherwise. He is to be tried and his guilt or innocence determined upon the evidence disclosed here in the courtroom and upon the law as given to you by the Court and uninfluenced by any other consideration or motive.

The offences which it is alleged that the defendant has committed, and for which he is now on trial, were committed, if at all, prior to the time when the armistice was signed between the allies and the central powers. By the signing of the armistice, the war between this country and Germany has practically come to an end, and the causes which prompted the enactment of the Espionage Act—the act under which the indictment against the defendant is drawn—have largely ceased to exist; but these conditions do not abate in the least the reasons that prompt and impel the prosecution of persons who, during the time that this country was at war with Germany, [239] knowingly, wilfully, and unlawfully transgressed the denouncements of the act. So that, whether the war has come practically to an end

or not, guilt, if guilt is imputable for a violation of the act, is as much amenable to the letter and spirit of the act as though the war were still in progress. In other words, the fact that the armistice has been signed, and that in all probability the war between the nations will actually and wholly cease, should not have any more influence with you in determining the guilt or innocence of the defendant than if he had been placed on trial during the vigorous prosecution of the war. He is to be tried, I repeat, and his guilt or innocence determined upon the evidence disclosed here in the courtroom, and upon the law as given to you by the Court, and uninfluenced by any other consideration or motive.

If I seem to speak somewhat in the present, by reason of the fact that the war has practically ceased, and the allegations of the indictment have relation to things said to have taken place prior thereto, you will readily see the occasion for doing so, and will, I trust, not be confused thereby.

The indictment contains seven counts, which charge the defendant with the commission of seven different offenses. Two or more of them may have arisen out of the same state of facts, yet nevertheless are distinct offenses, and must be so considered by you in your inquiry touching the guilt or innocence of the accused.

The first four counts are based upon the Act of Congress approved May 16, 1918, which is an amendment to the original Espionage Act of June 15, 1917; and the last three counts are predicated upon the original act. [240]

The first four offenses are alleged to have been committed on the 8th day of October, 1918. The first is for wilfully causing and attempting to cause, inciting and attempting to incite insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States. The second is for wilfully obstructing and attempting to obstruct the recruiting and enlistment service of the United States. The third for wilfully uttering language intended to incite, provoke and encourage resistance to the United States, and to promote the cause of its enemies; and the fourth by wilfully supporting and favoring the cause of a country with which the United States was then at war, to wit, the Imperial German Government, and opposing the cause of the United States therein, by then and there stating, declaring, debating and agitating, in the presence of L. W. Kinney, L. E. Gamaunt, J. A. Mead, E. C. Bendixen, F. B. Tichenor and others, in language in substance and effect as follows:

1. "I am a German and don't deny it—once a German, always a German."

2. "I served twenty-five years under the Kaiser [meaning William II, German Emperor] and I would go back to Germany tomorrow."

3. "I came here [meaning the United States] without anything and I can go away without anything."

5. "McAdoo [meaning W. G. McAdoo then and there Secretary of the Treasury of the United States] is a son-of-a-bitch. Why should this Government tell me what to do?"

6. "I am a pro-German ; so are my brothers."

7. "A German can never be beaten by a Yank [meaning an American]."

8. "You [meaning the United States] can never lick the Kaiser [meaning William II, German Emperor]—never in a thousand years."
[241]

9. "There will be a revolution in this country [meaning the United States] in ten years;—yes, in two—maybe to-morrow."

10. "I could take a gun myself and fight right here [meaning in the United States]."

11. "To hell with America."

12. "I have helped Germany in this war, and I would give every cent I have to defeat the United States."

13. "We [meaning Germany] have won the war."

And then it is alleged that other statements were made too indecent to be repeated here in the record.

In all these four counts it is further alleged that, by making these alleged statements, the defendant intended to do and accomplish the things and purposes that are charged against him.

As I have said, the last three counts namely, 5, 6, and 7, are predicated upon the original Act of Congress of July 15, 1917. The fifth count is for wilfully making and conveying false reports and false statements, with intent to interfere with the operation and success of the military and naval forces of the United States, and to promote the success of its enemies, by stating and declaring, between the first

day of July, 1917 and the first day of May, 1918, in the presence of one N. F. Titus and others, in substance and to the effect as follows:

1. That all reports of the German atrocities (meaning [242] thereby the reports of atrocities then being and having theretofore been committed by Germany in Belgium, France and on the high seas by its military and naval forces, while Germany was then at war with the United States) were lies and nothing but lies.

2. That the United States and the citizens thereof are dominated by the English Press.

3. That the United States Food Administration was organized and managed improperly; was wrong, outrageous and no good.

4. That the United States had no cause to attack Germany.

The sixth count is for wilfully causing and attempting to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States, to the injury of the service of the United States, by stating, declaring, debating and agitating between the dates of July 1, 1917 and May 1, 1918, in the presence of one N. F. Titus and others, in substance and to the effect as follows:

1. That all reports of the German atrocities (meaning thereby the reports of the atrocities then being and having theretofore been committed by Germany, in Belgium, France and on the high seas by its military and naval forces, while Germany was then at war with the United States) were lies and nothing but lies.

2. That the United States and the citizens thereof are dominated by the English Press.

3. That the United States Food Administration was organized and managed improperly, was wrong, outrageous and no good.

4. That the United States had no cause to attack Germany.

5. That this country (meaning thereby the United States) could never lick the Kaiser (meaning thereby William II, German Emperor) in a thousand years. [243]

6. That all the institutions of the United States (meaning thereby the Government of the United States) were inferior to the institutions of Germany (meaning thereby the Government of Germany).

7. That the United States was up against a hard proposition when it attacked Germany (meaning thereby that the United States would be unable to defeat Germany in the present war); that the American soldiers were mere amateurs, while the German soldiers were professionals.

8. That he (meaning thereby the said defendant) did not like the institutions of this country; that Germany was a better country to live in, and was a country where people enjoyed life.

9. That he (meaning thereby the said defendant) had lived in Germany twenty-five years, and that he preferred that country to this (meaning the United States).

10. That there was going to be a revolution in the United States, that the people of this country (meaning the United States) were living on a volcano; that something was liable to happen at any time and that the people of this country had better look out.

And the seventh count is for wilfully obstructing the recruiting and enlistment service of the United States, to the injury of the service of the United States, by stating, declaring, debating and agitating, between July 1, 1917 and May 1, 1918, in the presence of one Titus and others, in the substance and to the effect as follows: The language being the same as I have just read you from the sixth count.

And as it pertains to these last three counts, it is also further alleged that the defendant intended to do and accomplish the things charged against him, whereby it is charged that he offended against the several clauses of the [244] statute alluded to.

The defendant has interposed a plea of not guilty to the indictment, and to each of the several counts. This is in legal effect a denial of each and every material allegation contained in each of such counts, and each and every element of each of the offenses charged against him; and casts upon the Government the burden of establishing each and every material allegation and element of each offense charged, to your satisfaction beyond a reasonable doubt, without which the defendant must be acquitted.

Under our constitution, and the universally sanctioned and declared policy of this Government, every person charged with a crime, and while on trial be-

fore a court of justice is presumed to be innocent until his guilt has been established, to the satisfaction of the jury, beyond a reasonable doubt. This presumption is a thing of substance, not to be lightly regarded. It is of evidentiary value, and continues and remains with the accused throughout the trial and until the evidence adduced at the trial has convinced the jury, and satisfied their understanding, of the guilt of the accused, to a moral certainty, or, as otherwise expressed, beyond a reasonable doubt.

The fact that an indictment has been presented by the grand jury against the defendant raises no presumption that he is guilty of any offense. It is not any evidence of guilt whatsoever; nor should it be so considered by you. The grand jury, in presenting an indictment, proceeds *ex parte*, that is, by hearing one side only, namely, that of the Government, and without the presence of the defendant, and does not pass upon the question of his guilt or innocence, but merely [245] hears such evidence as is presented by the Government, and determines therefrom whether or not a sufficient probability of guilt is shown to warrant the defendant being placed on trial before a trial jury. In other words, an indictment is merely a way in which, under our laws, is framed the charge upon which the defendant is brought to trial.

In this connection I will define to you the expression "beyond a reasonable doubt." It has been used frequently in this trial, and will be used further in this charge. It is a term always used in criminal cases, but not easily defined. It means just what it

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In this connection I will define to you the expression "beyond a reasonable doubt." It has been used frequently in this trial, and will be used further in this charge. It is a term always used in criminal cases, but not easily defined. It means just what it

says, namely, a reasonable doubt left in your minds after weighing and scrutinizing the evidence, as to whether or not the defendant is guilty as charged. The evidence, in order to satisfy you beyond a reasonable doubt, must produce in your minds an abiding conviction to a moral certainty such as you would be willing to act upon in the important affairs of life as they concern yourself, that the defendant is guilty. Otherwise a reasonable doubt would yet remain in your minds. If, however, after weighing and scrutinizing the testimony as a whole, giving to each and every part of it its proper weight and credit, you reach an abiding conviction to a moral certainty of the defendant's guilt, such as you would be willing to act upon in vital and important affairs of life as they concern yourself, then it cannot be said that you entertain any longer a reasonable doubt, and it would, in that event, be your duty to find a verdict of guilty. If, however, there is any reasonable hypothesis or theory of the evidence which is more [246] consistent with innocence than with guilt, then it is your duty to adopt it and to act upon the hypothesis of innocence rather than of guilt, because only in that way can you uphold and give to the defendant, as the law requires, the benefit of all reasonable doubt. As long as there exists in your mind a reasonable hypothesis or theory of the evidence consistent with innocence rather than guilt, it cannot truly be said that you have reached a conviction beyond a reasonable doubt of guilt. At the same time it is proper, that I should say to you that a reasonable doubt does not, by its terms, exclude all possibility of error or

mistake. It means more than the greater weight of probabilities, but it does not imply the absence of the possibility of error or mistake. Absolute certainty is difficult if not impossible of attainment in any of the affairs of life where the exact sciences or mathematics are not involved. Therefore a mere captious doubt, a speculative doubt, a doubt conjured up by the ingenuity of counsel, a doubt suggested to you by reason of unwillingness on your part to convict, due to feelings of mercy or sympathy, cannot in law be said to be a reasonable doubt.

In brief, a reasonable doubt is one which exists or arises out of the insufficiency of evidence or lack of evidence to produce in your minds that abiding conviction to a moral certainty of guilt, of which I have already spoken. These rules apply in this case, and the defendant is entitled to the benefit of them, namely, he is, notwithstanding the presentation of an indictment, presumed to be innocent; and this presumption is evidence in his favor and remains with him [247] throughout the trial until it is overcome by evidence that satisfies you beyond a reasonable doubt.

Now, bearing in mind my caution and these general instructions, I will define to you the essential elements pertaining to each of the offenses charged as contained in each of the seven counts of the indictment. In the same connection, I will define to you the law governing in criminal prosecutions, which you will apply in your deliberations, and thus you will be enabled, in the light of all the evidence adduced at the trial, to determine what your verdict

shall be as to each and all of these seven counts.

Each count, as I have previously indicated, sets forth a distinct and separate offense, and calls for a distinct and separate consideration by you. The first four counts involve the same act or series of acts on the part of the defendant; that is, they are all based upon the same alleged utterances, alleged to have been made on the 8th day of October, 1918, on a Southern Pacific Railroad train, between Grants Pass and Roseburg, in the State of Oregon. However, they involve four different applications and interpretations of the same transaction. The grand jury, in formulating this indictment, has stated the situation to meet the several offenses thus denounced by the statute, leaving it ultimately to your judgment to determine whether an offense has been committed under any or all such charges under the evidence produced before you.

Of the last three counts, the fifth involves, perhaps, a separate transaction, and the sixth and seventh are predicated upon the same alleged statements or utterances [248] and are also to be separately considered by you. Therefore, you may find the defendant guilty upon all the counts, or not guilty upon all the counts; guilty upon one or more counts, and not guilty upon the balance, according as you may view the evidence under the law as declared by the Court. You may disagree as to one or more counts, and find a verdict as to others, although I hope you will be able to find a verdict upon each and all the counts.

As to the dates upon which it is alleged that the

several offenses were committed, I instruct you that it is not essential that they be proven exactly as alleged, or as laid in the indictment. It is only necessary that the time of doing the act or committing the offense charged be proven approximately as stated in the indictment. Indeed, it is sufficient that the time of commission be established at any date subsequent to the adoption of the acts of Congress under which the respective counts were preferred, and the finding of the indictment by the grand jury, namely, November 2, 1918. The first four counts, I repeat to you, were drawn under the amendatory Act of Congress approved May 16, 1918, and the last three counts under the original Espionage Act approved July 15, 1917.

The acts of Congress under which the several counts of the indictment are framed, are among a number of statutes commonly known as war statutes, enacted in war times, and to meet and serve war conditions and purposes. Obviously, they were enacted to meet the war danger to the Government—dangers arising within the body of the people in the home land rather than dangers from the enemy on the battle line; and the importance of this legislation lies in the fact it embodies the [249] policy which the Government has adopted for its protection against internal interference with its military operations and war program.

All of the provisions of the section of the statute upon which the indictments in the case are based have reference to war activities and war measures of the United States, or to the conduct intended to pro-

mote the success or cause of its enemies in the war, so that utterances concerning the war which are not intended to and do not interfere with or affect in any way the war activities or war measures of the United States and do not promote the success or cause of its enemies do not violate the statute.

The statute does not punish or attempt to punish beliefs. It does not punish sympathy. It does not punish opinions merely as such unless spoken with the purpose of hindering the Government in its war activities. It is lawful for an alien subject of the Imperial Government of Germany to abide and live in the United States if he obeys and observes its laws, rules and regulations, notwithstanding this law; and, while we are at war with Germany, without committing any offense under the provisions of this law, he may continue to hold his beliefs, sympathies or opinions, if he is not wilfully outspoken about them.

The defendant is not on trial here for being of German ancestry or in sympathy with the German Government, so far as that is concerned, or the German cause, and out of sympathy with the United States Government. That is not made punishable unless he gives utterance thereto with the wilful intent that I will explain to you hereafter. He is not on trial for having criticized the American Government or the officers of the American Government or the conduct of the war. There is no law in the United States [250] that punishes a man for his fair criticism of the conduct of the war or of the officials of the Government unless it was done with the purpose and intent that I will tell you of hereafter.

In other words, a man had and now has a right to criticise the Secretary of the Treasury or the Food Administrator, or the Departments of which they are the heads, if he does it with no intent to interfere with the Government in its military measures or activities.

In your deliberations in this cause, the first question you will be naturally called upon to consider is whether the defendant did in fact utter or give voice, at the times and places specified in the indictment, to the words or language in substance and effect like those set out in each of the seven counts. It is not essential that the Government prove the exact words set out in the indictment, and which I have heretofore quoted to you; but it must prove that the words uttered by the defendant were in all respects similar in substance and effect. In determining that question, you have no concern with the question of whether or not on that occasion he uttered other words substantially different from those imputed to him, even though such other words might in your opinion have a tendency to accomplish some one or more of the purposes set out in the various counts of the indictment, and even though you might believe that the defendant intended in uttering them to accomplish such purpose. The defendant is not accused of uttering words other than those stated in the indictment, and presumably he is not prepared to meet such accusations. Neither would a conviction or acquittal in this [251] case afford him any protection against a second prosecution for uttering other and different words than those set out. So

that if you do not believe beyond a reasonable doubt that at the time and place specified in the indictment the defendant uttered the words imputed to him, or words similar in substance and effect, or if you have a reasonable doubt upon that question it will be your duty to return a verdict of not guilty, without even considering any other issue in the case.

In this connection I wish to say to you that if you find beyond a reasonable doubt that the defendant did in fact utter the words imputed to him in the indictment or words in substance and effect like them, in determining what his purpose and intent was in so doing, you will have a right to consider what would be the natural, usual and necessary consequences of uttering such words at the time and place and in the presence and hearing of the people referred to in the indictment. You will bear in mind that the question in each case is, What did the defendant actually intend in uttering the words imputed to him, if he uttered them at all? There is no presumption which is conclusive, either in law or in fact, that he actually intended what may appear to you to be the natural, usual and necessary consequences of uttering such words, and you will consider this matter in connection with all the other evidence in the case for the purpose of determining what was in fact the defendant's actual purpose and intent. And upon the question of intent I shall have something more to say to you.

The first count in the indictment is based upon that provision of the law which declares that whoever, when the United States is at war, shall wilfully

cause or attempt to cause, or incite or attempt to incite insubordination, disloyalty, [252] mutiny or refusal of duty in the military or naval forces of the United States, shall be guilty of a crime. The words "when the United States is at war" are set forth in each count of the indictment, and that constitutes an element of the offense. But I instruct you, as a matter of law and as a fact that is known to everyone, that during the times stated in the indictment, and all of them, the United States was then at war with the Imperial Government of Germany, and hence you will have nothing further to determine as to that. Under this count, the questions for your determination are: (1) Did the defendant utter the words imputed to him, either literally or in substance and effect; (2) If he did, was the natural or reasonable or probable tendency of such utterances to bring about or produce disloyalty or refusal of duty in the military forces of the United States; and (3) Was it his intention to wilfully cause or attempt to cause, or incite or attempt to incite, insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States? If he made the statements imputed to him with the intent charged, it is not necessary that the Government should satisfy you that he was successful in producing disloyalty, insubordination, mutiny, or refusal of duty in the military or naval forces of the United States. Indeed, the words uttered may, in your opinion, have entirely failed to produce any such effect. On the contrary, you may believe that they have a contrary effect; that those to whom they

were addressed were rather stimulated in their loyalty than otherwise. The guilt or innocence of the defendant does not depend upon the success or want of success of the attempt, if he was [253] guilty of an attempt to cause insubordination, disloyalty or mutiny in the naval or military forces of the United States. You may feel satisfied that nothing that the defendant said or did had any effect to cause insubordination, and yet, if you believe that he made disobedience on the part of a person in the military the statements attributed to him in an attempt to do that, he would be guilty as charged in this count of the indictment.

And in this connection, insubordination means disobedience on the part of a person in the military or naval forces of the United States to the commands of officers, and the failure on the part of such person to abide by and conform to the rules, laws and regulations enacted and put in force for the government of the military and naval forces of the United States.

Disloyalty means lack of loyalty or fidelity; violation of allegiance; the doing of a disloyal act, the object of which is to hinder the objects and purposes of the Government in recruiting and enlisting soldiers for the military and naval forces.

Mutiny means revolt or rebellion or refusal to discharge a duty and to obey the orders of the constituted authorities of the military and naval forces of the United States.

Refusal of duty means refusal to comply with the rules and regulations relating to the military and

naval forces of the United States; or relating to the organization of the army or the navy of the United States; or relating to carrying on the war against Germany. [254]

There are many different ways in which this particular section may be violated, and many different grades of moral turpitude in doing it; that is, in attempting to or trying wilfully to cause insubordination in the forces that the United States had and was preparing in the war. It is not claimed that the defendant actually brought about any insubordination or refusal of duty; it is not claimed he brought about any disloyalty. The charge is, that is what he had in his heart—that it was his purpose and he tried to bring it about, and these words that the Government claims he spoke, were spoken, it is claimed, for that purpose; and that is what you have to decide.

Nor is it necessary that the Government should prove that the statements attributed to the defendant were made in the presence of persons liable to military service. It is sufficient if you find that such statements were wilfully made, with the knowledge that they might be reported to and reach the ears of persons in the military and naval forces of the United States, or liable to be called to the service under the selective act, and that they were made for that purpose, and with intent thereby to cause insubordination, disloyalty, mutiny or refusal of duty.

The question under this count is, if you believe that the language was spoken by him as charged in the indictment, what effect did he intend that such language should have upon those hearing it? Again,

I repeat, it is not necessary that the Government should prove that the words of the defendant actually caused insubordination, mutiny, disloyalty or refusal of duty. To so hold would be to defeat the whole purpose of the statute, for the purpose of the law as a whole [255] was not to wait and see if the seed of insubordination at a later date in some camp sprang into life and brought forth fruit, but it was to prevent the seed being sown initially. And moreover it is the purpose of this statute to enable the civil courts to prevent the sowing of the seeds of disloyalty; for, as to the fruits of disloyalty, through which a misguided soldier might be led by the disloyal advice, the military court martial already provided was sufficient. The statute was not addressed to the misguided man in the service, but was manifestly intended to include anyone who in any way wilfully created or attempted to cause or incite insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States.

The military forces of the United States as defined in this provision of the act and of the law are not limited to those actually enlisted and enrolled in the active, organized military forces. Such forces include also all male persons who are citizens of the United States, or who have declared their intention to become citizens of this country, between the ages of 18 and 45 years, who fall within the draft act of May 18, 1917, and the amendment thereto of August 31, 1918, and who have registered and have been classified, but have not yet been called into service. For the purposes of this act and this trial, I say to

you that all such persons thus registered and enrolled, and thus subject from time to time to be called into the active service, are a part of the military forces of the United States; and causing or attempting to cause, or inciting or attempting to incite disloyalty, insubordination, mutiny, or refusal of duty among them, or any of [256] them, will be sufficient to constitute the crime charged under this count. Nor is it necessary that the language spoken or uttered be addressed directly to one of the organized forces, or subject to the selective draft. It is sufficient that the language is calculated, by import and expression, to take hold somewhere, and that eventually it will have its impress in causing or inciting disloyalty or insubordination in the military forces of the United States, as I have defined them to you.

The second count of the indictment is the next one you will be called upon to consider. It is based upon that provision of the law which declares that whoever, when the United States is at war, shall wilfully obstruct or attempt to obstruct the recruiting or enlistment service of the United States shall be guilty of a crime.

The elements of this offense as charged are: (1) That the declarations and statements alleged to have been made by the defendant, or declarations and statements in substance and effect as those imputed to the defendant, must have been wilfully made by him at the time and under the circumstances alleged; (2) if he made such declarations and statements, or in substance and effect, that

their natural or reasonable or probable tendency and effect were to obstruct or constituted an attempt to obstruct the recruiting and enlistment service of the United States; and (3), that it was his intention to obstruct or attempt to obstruct the recruiting and enlistment service of the United States, or to bring about that result. It is not essential that he should have actually brought about such result, but it is sufficient that he intended to accomplish, in some measure, [257] the thing thus denounced by the law.

This statute is applicable, of course, only when the United States is at war. At such time the Government is chiefly interested in procuring men for the army and navy. It may at the outset, therefore, be safely assumed that the evil which Congress had in mind in enacting this statute, and which it wished to prevent, was the placing of obstacles in the way of raising an adequate army and navy, which was then an urgent and pressing necessity, and that it was not concerned with the means which might be devised to obstruct the recruiting or enlistment. The word "obstruct" is broad. It is defined as synonymous with "impede, retard, embarrass, oppose, to be or come in the way of, to hinder from passing, action or operation; to stop, impede, retard"; and such has been the construction generally given to it when it has been used in other federal statutes. It thus follows that whatever hinders or embarrasses the recruiting or enlistment service would also obstruct it. It is not necessary that the obstruction should be a physical one. It is clear that the enlistment or recruiting service would be quite as much obstructed and the

United States as severely injured by inducing eligible persons through public addresses, persuasion or any kindred means not to enlist, as by assault upon a recruiting officer, or demolition of a building in which a recruiting office is located, or tearing down or defacing recruiting posters or by actually intimidating recruits.

In other words, this provision of the act does not mean alone physical acts by which men shall be prevailed upon not to take the steps which their country requires them to take, or desires them to take. It does not mean, nor is it confined to going out and carrying on a campaign from house to house to dissuade from enlistment, [258] or from performing their duty under the selective act.

Nor is it necessary for the Government in order to make out a violation of this law, to go out in a community and find men who will testify that they were dissuaded by some act of the defendant or some word of his from performing their duty to their country under the law. That is not required. All that is required is that the defendant shall have used the language which is attributed to him, and which, taken in connection with the occasion upon which it was used, would naturally result in bringing about the thing which the law says shall not be done.

The provision of the statute under which this count is framed, not only applies to voluntary enlistment but also embraces all persons subject to the provisions of the Selective Service Act. It was intended by this law to prohibit the wilful obstruction of the Government in its efforts to raise an army to effectively deal

with the crisis which then concerned the country, whether it be directly against voluntary enlistment or the draft.

As to the matter of obstruction there are many ways that could occur in which enlistment and recruiting service of the United States could be obstructed or impeded. It does not have to be stopped. The statute does not mean that the obstruction must be extended to the point of actually stopping the whole service; it might be obstructed by taking the registration list and destroying it; by persuading some man to flee the country or to resist being put in the service; it might extend only to one man, but that would be an obstruction. So that obstruction in its broad sense means to hinder, to impede, to embarrass, to retard, to check, to slacken, to prevent in whole or in part. As used in this indictment, it [259] means active antagonism to the enforcement of the Act of Congress, that is, to effectively resist or oppose the commands of the law to the injury of the service, or by actual words intentionally to cause others to do so; to interfere or intermeddle in such a way and to such an extent as to render more burdensome or difficult the enforcement or execution of the law to the injury of the service.

If the natural and reasonable effect of what is said is to obstruct or to attempt to obstruct the recruiting and enlistment service, and the words are used in an endeavor to do so, it is immaterial that the duty to resist is not mentioned or the interest of the persons addressed is not suggested. That one may willfully obstruct the enlistment service without voicing

any direct language against enlistment and without stating that to refrain from enlistment is a duty or in one's interest, seems too plain for controversy.

To obstruct may be accomplished by raising an obstacle, a mental obstacle in the mind of the person to whom the remarks were addressed such as to cause him to pause and hesitate even though he might finally overcome it and not be prevented from enlisting. But if the remarks are such that they are reasonably and naturally calculated to cause the person to whom they are addressed to be impeded and retarded in his willingness to offer himself as an enlisted soldier and were so intended and the effect of the remarks is to cause such a person to pause and be delayed in reaching a decision, then it would be sufficient for a violation of the statute.

With reference to the attempt to obstruct the recruiting or enlistment service of the United States or the [260] intent to cause insubordination, mutiny and refusal of duty among the naval and military forces of the United States, the truth or falsity of any statement that the defendant might make in connection with what he did or in an attempt or with an intent on his part to cause insubordination, makes no difference whatsoever. In other words, if you find that the defendant willfully caused or attempted to cause insubordination or willfully attempted to obstruct the recruiting service, then it does not make any difference whether or not the statements which you may find he made were true or false, because, whether they were false or whether they were expressions of opinion, is absolutely immaterial in so

far as that part of the act is concerned, so long as they resulted in his willfully causing or attempting to cause insubordination, or wilfully causing or attempting to obstruct the service.

In determining what was the natural and ordinary result of the language used by the defendant in the manner in which he used it and in the connection with which he used it, you have to take into consideration what are matters of common knowledge; that men must go from home, and fathers and mothers must make the sacrifice; that men who enlist are often influenced, more or less, by the wishes of their parents, and they are influenced, more or less, by their view of the conditions that they are entertaining. Take all these things into consideration, then take the language used, if you find it was used, and determine whether or not his purpose or intent was to interfere with men whose minds might be guiding them to enlist, or to interfere with those who might have influence or domination over them, or control over them; in other words, from a practical standpoint, [261] whether or not it would interfere naturally with the number of enlistments or the number recruited by the Recruiting Office. It is not necessary, of course, or not practicable that the Government should show that some person was induced not to enlist by reason of the things charged to have been said. It is sufficient if the things said were said with that purpose and that they were in their nature such as ordinarily would bring about that result. Then the evidence is complete.

Having defined these offenses so denounced by the

statute, you will appreciate how essential it was to the successful prosecution of the war that none of these evils should possess the men of the country subject to draft, and that no obstructions should be imposed in any way to impede, retard, hinder, or make it harder or more difficult for the Government to recruit and enlist men in the military service. Hence, there was great and wholesome reason for this statute, and the reason for its rigid enforcement was just as potent. Nothing should interfere with the military and naval forces nor with the work of recruiting and enlisting men to go to make up such forces. Any means employed to cause these evils is denounced and subject to punishment.

The third count of the indictment is based on that provision of the law which declares that, *whenever*, when the United States is at war, shall wilfully utter or publish any language intended to incite, provoke or encourage resistance to the United States or promote the cause of its enemies, shall be guilty of a crime. It is charged in the third count that by the use of the language imputed to him [262] the defendant thereby intended to provoke and encourage resistance to the United States, and to promote the cause of its enemies.

The elements of this offense, each of which the Government must establish by the evidence beyond a reasonable doubt, are: That the defendant wilfully uttered or published certain language; that the language thus uttered or published was intended either to incite or provoke or encourage resistance to the United States or to promote the cause of its enemies;

that the language uttered in the indictment, or the substance thereof, must be found by you beyond a reasonable doubt to have been so uttered and published. And you must also find beyond a reasonable doubt that the language as uttered and published was such that the natural or reasonable and probable tendency and effect thereof would be to incite, provoke or encourage resistance to the United States or promote the cause of its enemies; and finally that the defendant, in uttering or publishing such language, did so wilfully and with the specific criminal intent either to incite, provoke or encourage resistance to the United States or to promote the cause of its enemies. Each and all of these elements, as I have said, must be proved by the Government beyond a reasonable doubt; otherwise the defendant should be found not guilty.

Now, it is for you to say whether or not the Government has proved beyond a reasonable doubt the utterance by the defendant of the language charged in this indictment, or the substance thereof, whether or not that language so uttered or published was intended to incite, provoke or encourage [263] resistance to the United States or to promote the cause of its enemies, or whether the natural or reasonable and probable tendency and effect of the language was either to incite or encourage resistance to the United States or to promote the cause of its enemies. And it is also for you to say whether or not it was uttered wilfully and with the specific criminal intent.

It is proper that I should instruct you as to what is meant by resistance to the United States as used

in this law and in this charge. The other words in the law and in the charge are plain and were used and have been used in my opinion in the ordinary, every day, common sense meaning.

Resistance, as a proposition of law means to oppose by direct, active and *quasi*-forcible means the United States, that is the laws of the United States and the measures taken under and in conformity with those laws to carry on and prosecute to a successful end the war in which the United States was then and is now engaged. Resistance means more than mere opposition or indifference to the United States or to its success in the war. It means more than inciting, provoking or encouraging refusal of duty, or obstructing or attempting to obstruct the United States. The element of direct, active opposition by *quasi*-forcible means is required to constitute the offense of resisting the United States under this provision of the law and under this charge of the indictment. The offense, however, may be committed by wilfully and intentionally uttering language intended to promote the cause of the enemies of the United States without necessarily inciting, provoking or encouraging forcible [264] resistance to the United States. To promote means to help, to give aid, assistance to the enemies of the United States in the waging of the war. The cause of the enemies of the United States means any and all of their military measures taken or carried on for the purpose of winning the war as against the United States. The cause of the United States as used in this act does not mean the reason which induced the

Congress of the United States to declare a state of war between the United States and the Imperial Government of Germany. It does not mean the aims of the war in the sense of the terms of peace to be imposed or the results to be accomplished or the time and conditions under which it is to be brought to a termination. In plain language, it means the side of the United States in the present impending and pending struggle. The words "oppose" and "cause" should be weighed and considered by you as limited to opposing or opposition to such military measures as are taken by the United States under lawful authority for the purpose of prosecuting that war to a successful and victorious determination.

The law does not forbid differences of opinion or reasonable discussion as to the causes which induced Congress to declare war or as to the results to be attained by war, or at the end of the war, nor the time and conditions under which the war should be brought to an end, nor any reasonable and temperate discussions and differences of opinion upon any or all of the measures or policies adopted in carrying on the war. The law is limited to making it a crime to oppose by word or act the military measures taken by the United States or under lawful authority by the officers of the United States for the purpose of prosecuting that war to a successful end. [265]

The fourth count of the indictment is based on that provision of the law which declares that "Whoever shall by word or act, support or favor the cause of any country with which the United States is at war, or by word or act oppose the cause of the

United States therein'' shall be guilty of an offense.

It is charged by this count, that, by the use of the language imputed to the defendant in the indictment, the defendant thereby intended to support or favor the cause of the Imperial Government of Germany and to oppose the cause of the United States in the present war. The elements of this offense each of which the Government must establish by the evidence beyond a reasonable doubt, are: First, that the defendant wilfully uttered or published certain language; that the language thus uttered or published was intended either to support or favor the cause of the Imperial Government of Germany, a government with which the United States was at war, or to oppose the cause of the United States therein, namely, in such war; that the language uttered as set forth in the indictment, or the substance thereof, or some substantial part thereof, must be found by you, beyond a reasonable doubt, to have been so uttered and published. And you must also find beyond a reasonable doubt that the language as uttered and published was such that the natural or reasonable and probable tendency and effect thereof would be to support or favor the cause of the Imperial Government of Germany in the present war as against the United States, and to oppose the cause of the United States in such war; and finally that defendant, in uttering or publishing such language did so wilfully, and with the specific criminal intent either to support or favor the cause of the Imperial Government of Germany in the [266] present war against the United States, or to oppose

the cause of the United States in such war. Each and all of these elements, as I have said, must be proved by the Government beyond a reasonable doubt; otherwise the defendant should be found not guilty.

Now, it is for you to say whether or not the Government has proved, beyond a reasonable doubt, the utterance and publication by the defendant of the language charged in the indictment, or the substance thereof, or some substantial part of the same; whether or not that language so uttered or published was intended by the defendant to support or to favor the cause of the Imperial Government of Germany as against the United States in the present war, or to oppose the cause of the United States in such war; and whether the natural or reasonable and probable tendency and effect of the language was either to support or to favor the cause of the Imperial German Government as against the United States in this war, or to oppose the cause of the United States therein. And it is for you to say whether or not the language so imputed to the defendant was uttered wilfully and with the specific criminal intent.

You will note the language of the act: "Whoever by word or act shall support or favor the cause of any country with which the United States is at war, or by word or act oppose the cause of the United States in such war." The charge is that the defendant, by the use of the language imputed to him in the indictment, did support and favor the cause of Germany in the present war, and did oppose the cause of the United States therein. It is the supporting

or favoring of the cause of the German Government in the war, and the opposing of the cause of this Government in the war that [267] the statute denounces. The method of supporting or favoring the one cause and opposing the other is declared to be by word or act. When this Government declared war upon Germany it had a cause for so doing, which was stated at the time. The German Government challenged the issue, and at once entered upon war against this Government, if it had not in reality been engaged in such a war previously, and it is the policy and edict of the law that no person within the confines of the United States shall support or favor the German side of the cause of war for which this Government is or was fighting, or oppose the American side. The meaning or signification of the words "support or favor" is plain, and they need no other definition or explanation for your comprehension or understanding. I may say they mean to lend assistance to, or to aid or give countenance to, or to espouse the cause upon the one side, that is, the side of the German Government. So of the word "oppose." Its significance is also plain and easily understood. It simply signifies to resist, combat, strive against, to set one's face against, make a stand against.

The intention of the law is that to support or favor, or to oppose, must be something more than a merely passive operation. The word or act must be something active, lending support to or favoring the cause or the side of Germany, or opposing the cause or the side of the United States. It must be of the nature that the effort will lead to the conviction that

the accused really, by word or act, supported or favored the cause of Germany as against the United States in the war, or opposed the cause of the United States therein. The offense, therefore, might be committed by wilfully and intentionally uttering language [268] designed to support or favor the cause of Germany as against the United States, or to oppose the cause of the United States in the war with that country, and which language so uttered, by its natural import and meaning, has that effect, and this may be accomplished without encouraging forcible resistance to the United States. In other words, the statute does not denounce the mere harboring of views which support or favor the German cause, or oppose the cause of this country, but it does denounce the utterance of such views, and any attempt to avow them in discussion with others, or the assertion thereof in the presence of another or others, because of the effect such avowal or assertion might have upon the acts and demeanor of others, affecting their loyalty and patriotism towards this Government.

The "cause of the United States" as used in the act does not mean the reason which induced the Congress of the United States to declare a state of war between the United States and Germany. It does not mean the aims of the war in the sense of the terms of peace to be imposed, or the results to be accomplished, or the time and conditions under which it is to be brought to a termination. In plain language, it means the side of the one Government or the other, as previously expressed, in the present im-

pending and pending struggle, or that which was impending or pending.

The law, I repeat, does not forbid differences of opinion or reasonable discussion as to causes which induced Congress to declare war, or as to the results to be attained by war, or at the end of the war, nor the time and conditions under which the war should be brought to an end, nor any reasonable and temperate discussion and differences of opinion upon any or all of the measures or policies adopted in carrying [269] on the war. Nor does it forbid reasonable discussion of the causes of the opposing governments in this war, for this is one of the means by which the people inform themselves touching the subject. It is the openly espousing the cause of Germany by utterances or acts lending support or favoring the cause of that country, or by like method opposing the cause of this country in the war that the statute forbids and denounces.

If the defendant wilfully uttered the language imputed to him, substantially and in effect as set forth in the indictment, with the intent and purpose of supporting or favoring the cause of Germany in the war, or opposing the cause of the United States therein, and the natural or reasonable and probable tendency and effect of the words and language so spoken and uttered is to that effect, interpreted by the attending circumstances and demeanor of the defendant, then the defendant would be guilty; otherwise, he should be acquitted on this charge.

Count five is predicated upon the original Espionage Act, and on that portion thereof which declares

that whoever, when the United States is at war, shall wilfully make or convey false reports or false statements, with the intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies, shall be guilty of an offense. The elements of this offense to be established are: (1), that the defendant must have wilfully made the reports or false statements imputed to him in the indictment in substance and effect as alleged, or some substantial part thereof; (2), that such reports or statements were false, and known to the defendant to be false; and, (3), that he made the same with [270] the intent and purpose of interfering with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies. The wilful intent is important, and you must find beyond a reasonable doubt, not only that he made and conveyed false reports and false statements, knowing them to be false, but that he made or conveyed them with the specific, wilful intent thereby to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies.

The term "military forces" as defined in this provision of the original act and of the law is not limited to those actually enlisted and enrolled in the active organized military forces. The act of May 18, 1917, providing for the creation of an active army for the purpose of carrying on this war, required that all male persons between the ages of 21 and 30, both inclusive, should enroll or register for military ser-

vice, and it is from the men thus registered, excluding aliens who have not declared an intention to become citizens, that contingents of men were from time to time called into the active military forces of the United States. For the purpose of this act and of this trial you are advised that all such persons thus registered and enrolled and thus subject from time to time to be called into the active service are a part of the military forces of the United States. Any interference by the means thus denounced with the operation or success of said forces comes within the purview of the statute.

What is an intent to interfere with the operation or success of the army or navy of the United States? A statement that was made with the intent to interfere with [271] the operation in the field of the troops, with the movements of the armies, with the supply of their munitions, their food, their equipment, would quite readily, to your minds, be a statement made with the intent to interfere with the operation or success of the troops. But the statute is not limited to a direct interference with troop movements or with the armies in uniform or with their military maneuvers. Anything that interferes with the operation or success of the army or navy, if it is a false statement, made as this statute sets out, is denounced the same as if it directly interfered with the movement of an army going into battle. It is necessary in order that the armies may operate and be successful not only that they have the proper support and management in the field, but it is necessary that at home they should be supported by

money, by taxation, and by the spirit of the people. The army and navy could not successfully operate nor succeed if we should refuse them money, or if we should fail to send them material resources, or if the country should manifest such a spirit of indifference and failure to support the army and navy in their work that there would be no effective backing for them such as the nation must always give to its armies in the field.

So the operation and success of the army and navy may be interfered with by the failure to raise funds for their efficient support and the like. Whatever chills or retards the support of the war by the people of the nation at home also tends to defeat the operation and success of the army and navy in its actions on the field of battle.

And so if you find that the defendant in what he said (if you find that he said the things in substance and effect as imputed to him by the indictment, and that they were [272] false), did so with the intent that his hearers should be retarded in their support of the army and navy to any extent, and that they should thereby, and as a consequence of what he said, diminish their effective support of the Government, such as by subscribing to the bonds, or the war-savings stamps, or whatever method of giving their money to the Government was necessary to support the army and navy in its operations, then you can find that what he said was with the intent that it should interfere with the operation and success of the military and naval forces of the United States.

Count six is based upon that provision of the

original Espionage Act which makes it unlawful for anyone to wilfully cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States. This provision of the law was re-enacted in the amendment to the Espionage Act without any change except the words "incite or attempt to incite" are omitted, and the instructions I have already given you on this provision of the law under count one are applicable here. The essential difference between counts two and six is with respect to the statements alleged to have been uttered, the times at which they were uttered, and the persons present when they were uttered. You will therefore have in mind the instructions I have given you pertaining to count one in your consideration of the testimony as it relates to the guilt or innocence of the defendant under this charge of the indictment.

Count seven is based upon that portion of the original Espionage Act which makes it unlawful for anyone to wilfully obstruct the recruiting or enlistment service of the United States to the injury of the service of the United [273] States. This was changed in the amended Espionage Act by including the words "and attempt to obstruct" and by omitting the words "to the injury of the service of the United States." So far as the words "to the injury of the service of the United States are concerned, they do not change the intendment of the act, for whatever has the effect of obstructing the recruiting or enlistment service of the United States works to the injury and damage of the Government. The necessary and

logical effect and sequence of the act of retarding or making it harder or more difficult for the Government to act and carry forward the work of recruiting or enlistment is to work injury and damage to the Government. No other or more specific injury to the United States is necessary or required to be shown.

What I have already said concerning this provision of the law as amended, upon which count two was based, could be repeated here with reference to count seven, for even under this statute, prior to its amendment, it was not necessary to show that any one was actually obstructed from enlisting, although that would be one method in which the enlistment service could be shown to be obstructed. The enlistment service embraces a number of agencies. In the first place the law allows enlistment. There is an army in which they can enlist at any time there was a war in which we were engaged, in which enlistments were desired in the army and navy. There were recruiting and enlistment offices provided. All of these agencies were a part of the recruiting and enlistment service of the United States, but it embraces more; in addition to these methods by which a man could get into the service, there was the service of appeal to enter the service by means of advertisements authorized by the [274] Government, by appeals to men's patriotism; to the love of their country to whatever would induce a man within the enlistment age to offer himself as a soldier in the army or navy of the United States. The enlistment service of the United States embraced whatever agency legiti-

mately appealed to a man within the proper ages, to offer himself as a soldier or sailor of the United States. When Congress said that no one shall wilfully obstruct the recruiting and enlistment service, it meant that the entire service should be free from obstruction, and by obstruction it meant it should be free from hindrance, embarrassment or delay as well as effective opposition.

Now, referring to counts one, two, three and four, there are two other matters concerning which I should instruct you. The defendant claims, first, that F. B. Tichenor, a deputy United States marshal, and L. E. Gamaunt, a deputy sheriff of a county in the State of Washington, induced and incited, or lured the defendant on to make the statements charged against him in these four counts, and therefore he ought not to be held amenable to the law; and, second, that the defendant was so intoxicated at the time that he was not mentally capable of deliberation or of forming or harboring an intent to do the things he is charged with doing by these first four counts in the indictment.

As to the first of these contentions, I instruct you that the policy of the law will not, and does not, uphold or sustain a conviction where the defendant has been incited or induced or has been lured by the officers of the law to commit the crime for which he has been indicted and is being tried. Officers of the law are [275] required, and are bound by good conscience, to be just to their constituency, as well as alert in detecting and ferreting out the commission of crime, and discovering the perpetrators thereof; but

they must not become parties with others in the transgression of the law. This does not preclude such officers, however, where they are informed that a person is engaged in, or is about to commit a crime, from taking such steps as will put them into possession of all available information attending the acts and demeanor of such person, so as to enable them to bring the perpetrator to account. And the law even goes so far as to uphold such officers where they merely aid one in the commission of a crime, where the crime has been conceived, or concocted, or initiated, by the accused. "The rule," say the courts, "does not proceed from or rest on any limitation of the right of the officers of the law to obtain evidence of crime in any manner possible. Nor is it a defense to a prosecution that the officer participated in the commission of a crime, if the genesis of the idea or the real origin of the criminal act, sprang from the defendant and not the officer." The differentiation is thus otherwise stated: "The fact that a detective or other person suspected that the defendant was about to commit a crime, and prepared for the detection, as a result of which he was entrapped in its commission, is no excuse, if the defendant alone conceived the original criminal design."

This is a sufficient exposition of the law, and the application is for your judgment, in the light of the evidence adduced here upon the trial. The course of your inquiry upon this subject will naturally be to ascertain whether the defendant first conceived the idea or purpose [276] of then uttering statements upon and discussing the war situation, and of ex-

pressing himself as his disposition prompted him; that is to say, whether the discussion entered upon there, or what he said there, originated with him, or whether he was incited and induced by the officers in the beginning, or in its initiatory stage, to enter upon the transgression of the law, and thereby lured him to do that which he had not previously criminally conceived of, or that which had not originated in his own mind. If you find that the former was the case, that is, that the purpose of thus transgressing the law originated with the defendant, he would be amenable to the law, notwithstanding the officers may have availed themselves of the situation for possessing themselves of and preserving and presenting the evidence of what he did. But if, on the other hand, the officers of the law, and those acting with them, first suggested, or lured the defendant to take the initiatory step, or put into his head the original thought or idea of committing the offense charged, and he thenceforward acted under their dominating influence, then he could not be held guilty under these first four counts.

Your deduction and conclusion on this subject will be resolved by a careful and considerate survey of all the testimony bearing thereon, or that may serve to enlighten you.

Referring to the second contention, namely, that the defendant was so drunk at the time that he was incapable of forming an intent or design, I instruct you as follows:

Intent is an essential element in the perpetration of each of the four offenses charged against the de-

fendant in these first four counts of the indictment. If the [277] intent is absent, the defendant cannot be held accountable for what he is alleged to have done. Drunkenness is no excuse for the commission of a criminal offense, yet while this is the law, it is also the law that, where a specific intent is necessary to be proved before a conviction can be had, it is competent to show that the accused was at the time wholly incapable of forming such intent, whether from intoxication or otherwise. In other words, it is a proper defense to show that the accused was intoxicated to such a degree as rendered him incapable of entertaining the specific intent essential to the commission of the crime charged.

I therefore instruct you, gentlemen of the jury, that, if the defendant was intoxicated at the time of making any of these statements which are set forth in counts one, two, three and four, to such an extent that he could not deliberate upon or understand what he said, or form an intention to say what he did, your verdict should be not guilty. Otherwise, such a conclusion would not necessarily follow.

This, as I have indicated, pertains to the first four counts in the indictment.

It is common knowledge, however, that a person who is much intoxicated may nevertheless be capable of understanding and intending to utter the things that he is pleased to speak. And, as I have advised you, evidence of drunkenness is admissible solely with reference to the question of intent. The weight to be given it is a matter for the jury to determine, and it should be received with great caution and carefully

examined in connection with all the circumstances and evidence in the case. [278]

You should discriminate between the conditions of mind merely excited by intoxicating drink, and yet capable of forming a specific intent and purpose, and such a prostration of the faculties as renders a man incapable of forming an intent. If the intoxicated person has the capacity to form the intent, and conceives and executes such intent, it is no ground for reducing the degree of his crime that he was too intoxicated to conceive it readily by reason of his intoxication.

You have heard the testimony relating to the defendant's alleged intoxication at the time, and you should consider the whole of it bearing upon the subject, coming from whatsoever source, and determine for yourselves the extent of the defendant's intoxication, if you find that he was intoxicated, and to what extent, if at all, it impaired his faculties, whether to the extent of rendering him wholly incapable of forming an intent, or whether his faculties were still left in such a condition as that he was yet able to think and reason, and to form a design of his own to do things upon his own account. If he was, then he would be amenable.

You will note, gentlemen, that the term "wilfully" is employed in the statement of the statutes as to what will constitute the offense. The word "wilfully," as I have stated, is defined as meaning willingly, purposely, intentionally, as distinguished from accidentally or inadvertently. This means that the acts complained of must have been done with knowl-

edge on the part of the defendant of what he was doing, and that he, having such knowledge, intentionally did the acts and intended thereby and had such purpose therein that the result of doing such acts would be to cause insubordination, disloyalty, or [279] refusal of duty in the military service, or would tend to impede or hinder the recruiting and enlistment of men into the service and the like, to the injury of the United States, or do those other things charged against him in the indictment.

I will now instruct you further as to the meaning of the word "intent." The criminal intent essential to any violation of the statute means a wicked, evil, or wilful intent to accomplish or produce the results forbidden and made punishable by the statute, and where words only are relied on to establish a violation of the statute they should be closely regarded, as the witnesses testifying that oral statements were made by defendant may have misunderstood what he said, and may have unintentionally altered a few of the expressions really used giving an effect to the statements completely at variance with what the party really did say.

Intent and purpose are largely a matter of the mind and heart; and you must be guided pretty largely by a man's acts and demeanor. You must look into his heart and see what a man has there. What a man says as to his intention is not controlling unless the jury believes him. The jurors have a right to and should consider what he says and give it proper weight according to the credibility due him, together with all the other evidence in the case, and

determine what his real purpose and intention were. So it is here. You must judge this defendant as to his true intention and purpose, not only by what he says, having in mind his credibility, but by what he has done, by his acts and conduct at the time and previously, and his acts and conduct as you have observed them here. In this relation, I will say that the law presumes that every man intends the natural consequences of his acts knowingly committed, or his [280] spoken words, or in a case like this in which a specific intent affecting the act is a necessary element of the offense charged, the presumption is not conclusive, but is probatory in character. It is for the consideration of the jury in connection with all the other evidence in the case, considering all the circumstances as you may find them, including the kind of person that made the declaration, the place at which the declarations in this case were made, the persons who were present, and all the circumstances attending them, to the end that you may judge the real intent with which they were made. In a case of this character the jury may find from the facts and circumstances, together with the language used, the intent, even though the intent was not expressed—directly expressed. In other words, you may infer the intent from the character and the natural ordinary, necessary consequences of the acts.

Now, gentlemen, this is sufficient reference to the specific crimes charged against the defendant. Each and all of the elements of the offenses charged in the seven counts, which will be submitted to you, as I have already stated and now repeat, must be found

by you from the evidence beyond a reasonable doubt. The number of counts contained in the indictment must not be permitted to influence your judgment as to the guilt or innocence of the defendant. You are not to assume that the defendant is guilty of something because there are so many charges made against him. Each charge, as I have advised you, is a separate charge of a separate independent crime. If the evidence justifies it, the defendant may be found guilty of all or any of the offenses charged, and he should be acquitted upon all or any of the charges, if the evidence does not warrant conviction.

I have also said to you, and I repeat, that you must find beyond a reasonable doubt that the defendant uttered [281] the words and language charged, as set out in the several counts of the indictment, or the substance and effect thereof.

It is not necessary that the Government should prove beyond a reasonable doubt that the defendant used the exact language charged in the indictment, or that he used all of the language charged therein, or that the language charged therein is all that was uttered or spoken by him at the times and places in question.

It is, however, necessary that the Government should prove, beyond a reasonable doubt, that he did utter and speak the substance of the words and language charged in the several counts, considering each count as a separate and distinct charge, that is, language of the same tenor and effect as therein set out; but it is not necessary that the Government prove that he used the substance and effect of all the words

and language charged. It will be sufficient if you find beyond a reasonable doubt that he used the exact words, or the substance thereof, or words and language of the same tenor and effect, or so much thereof as is sufficient to constitute under the first count the offense of wilfully causing or attempting to cause, or inciting or attempting to incite, either insubordination or disloyalty or refusal of duty in the military or naval forces of the United States; or under the second count, as shall be sufficient to constitute the offense of wilfully obstructing or attempting to obstruct the recruiting and enlistment service of the United States; or, under the third count, as shall be sufficient to constitute the offense of wilfully uttering language intended to incite, provoke and encourage resistance to the United States, and or promote the cause of its enemies; or, under the fourth count, shall be sufficient to constitute the offense of wilfully supporting or favoring the cause of the Imperial Government of [282] Germany, and or opposing the cause of the United States in the war; or, under the fifth, sixth, and seventh counts, as will be sufficient to constitute the offenses therein severally charged and set forth.

I have already said to you that you must find, beyond a reasonable doubt, that the defendant wilfully uttered or spoke the words or language imputed to him, and that wilfully means willingly, knowingly, purposely, intentionally, and as contradistinguished from accidentally or inadvertently; and that you must find that the defendant had the specific criminal intent as charged in each of the seven counts.

Ignorance of the law, of course, excuses no one. A person accused of a crime cannot be heard to say that he did not know the law; but notwithstanding this rule, what the defendant's intentions were when the words were spoken is essential, and it must be shown, in order to convict, that his specific intentions were to violate the law in the specific manner charged.

Now, in this connection and as bearing on the question of intent, you should be careful not to mix motive with intent. Motive is that which leads to the act; intent is that which qualifies it. A crime may be committed with what may be regarded as a good motive, or it may be committed with an evil motive, or it may be committed with a good and an evil motive. So that no matter if the defendant's motive and purpose may have been good and has been merely that which I have above stated, namely, to convey information to his fellow-citizens in the assumed exercise of the right and in the belief that he was exercising the constitutional right of free speech, he is nevertheless guilty if he had the specific criminal intent to accomplish the acts and to produce the effect and [283] result forbidden by the specific provisions of the law to which I have called your attention.

If you find beyond a reasonable doubt that he had a specific criminal intent to produce the results and the consequences forbidden by the law, then he is guilty, no matter whether he uttered these things in the exercise of a belief that he was promoting some good and worthy cause. If, however, you do not so find be-

yond a reasonable doubt such specific criminal intent, then it is equally your duty to find him not guilty.

In scrutinizing and weighing the evidence, particularly in weighing the words and utterances of the defendant, or such part thereof as you may find, beyond a reasonable doubt, were uttered or published, you must take the words and language as an entirety and as a whole. It is by the general purport and effect, by purport and meaning of the entire utterance, that the defendant is to be judged, and not by isolated sentences taken from the context. The context may often qualify the meaning, purport and effect of some particular sentence or word. Sentences and some words standing alone may convey an entirely different meaning and may have a natural and reasonably probable tendency to produce an entirely different effect or understanding on the jurors than taken in connection with the context from which they are excerpted. It is, therefore, proper that you should and must consider the language as a whole.

You are also to weigh and consider these words and utterances in the light of all the surrounding circumstances as shown by the evidence, the time, the place and occasion when uttered, the persons present and listening thereto. You are to give to his words if you believe he uttered them, their [284] natural, common-sense meaning, unless the context or the evidence shows that they were used by the defendant in a sense different from their every-day common-sense use. It is the sense in which these words and utterances would be naturally understood by persons to

whom they were addressed, and who heard them, that is the important consideration in determining their meaning, purpose and effect.

Now, certain testimony has been permitted to go to you as statements made by the defendant at other times than the occasion charged in the indictment. This testimony, as I have said to you at the time of its admission, and as I wish to repeat now, was permitted to go to you and is to be weighed by you only in enabling you to find the intent with which the words and language were uttered as charged in the indictment, if they were uttered at all. The defendant is not on trial and is not to be tried for any other offenses than those charged in the indictment. Utterances made by him at any other time or place are not to be weighed by you for the purpose of enabling you to find that he uttered the language charged or that he committed the offense charged at that time and place, but only if you shall find from the evidence relating thereto beyond a reasonable doubt that he uttered the language or substance of it, as charged in the indictment, at that time and place, and that the natural or reasonably probable tendency and effect thereof was to produce results forbidden by the provisions of the law and covered by the seven counts of the indictment, then and in that event being required to pass to a consideration of the specific intent with which he made the utterances, you may for that purpose alone weigh and consider the testimony permitted to go to you as to what he said at some other time or place. [285]

To further explain to you the purpose of allowing

testimony touching statements made by defendant at other times than the occasions charged in the indictment, I instruct you that it was not to prove the utterances of the language set forth in the indictment, and it should not be so considered by you, but to show the bent of defendant's mind and his attitude as between this country and Germany, with a view to enabling you to determine the defendant's real intention in saying and doing what the evidence convinces you that he has said and done, as it pertains to the charges made against him.

The defendant was born in Germany, but later came to this country and has since become naturalized in pursuance of the laws of the United States, so that he is a citizen of the United States, and is entitled to the same rights and privileges as other citizens of this country. He may engage in the discussion of public questions, and of men and measures, but he, like any other citizen or person sojourning in this country, temporarily or otherwise, is required to observe the laws of this country and the rules and regulations for assembling the armies and navies for the carrying on of the present war with Germany; and is answerable, like other persons, for the transgression of those laws, rules, and regulations.

The defendant has taken the witness-stand in his own behalf, and has denied in large measure the utterances imputed to him, and as to others he disclaims any wrong or disloyal intention. In determining touching the credibility of his statements, you will take into consideration the testimony of the

Government which tends to his inculcation, his former history and deportment, his bent of mind so far as is disclosed by the testimony, and his predilection, if any, whether favorable or unfavorable to this Government, and what [286] leaning, if any, he has towards Germany as against this Government in the present crisis, or whether his present leaning is one of loyalty to this Government, and, from all this, together with all the other testimony in the case bearing upon the subject of inquiry, you will ascertain and determine by a calm, fair, and impartial inquiry and investigation, uninfluenced by any present passion or prejudice, the truth of the charges made against him in the indictment, and thus you will resolve your verdict, whether it shall be one of guilty or not guilty.

I instruct you, gentlemen of the jury, that you are the sole judges of the credibility of witnesses and the weight and value to be given to their testimony. The Court gives you the law of the case, and it is your duty to take the law implicitly from the Court and apply it and observe the rules as the Court has laid them down for your guidance. It is a rule of law as well as of reason that positive testimony is of greater weight than negative. In determining as to the credit you will give to a witness and the weight and value you will attach to a witness' testimony, you should take into consideration the conduct and the appearance of the witness upon the witness-stand; the interest of the witness, if any, in the result of the trial; the motives of the witness in testifying, the witness' relation to or feeling for or against the

defendant or the alleged injured party; the probability or the improbability of the witness' statements; the opportunity the witness had to observe and to be informed as to the matters respecting which such witness gives testimony, and the inclination of the witness to speak the truth, or otherwise, as to matters within the knowledge of such witness; and you should be slow to [287] believe that any witness has testified falsely, but should strive to reconcile the testimony of all the witnesses so as to give credit and weight to all the testimony if possible. But it is a rule of evidence that a witness found to be false in one particular is to be distrusted in all. All these matters being taken into account, with all the other facts and circumstances given in evidence, it is your province to give to each witness such value and weight as you deem proper. Having determined the credibility of the witnesses, you will then be able to determine what the facts are under the testimony, and thereby be enabled to render your verdict.

I will say, in this connection, that the defendant has been a witness in the case in his own behalf. You will treat him as any other witness in the case and apply the same rules in order to determine his credibility as you would apply to the other witnesses, taking into consideration his interest in the case or the outcome thereof.

What the Court may have said during the trial of this cause at any time, from which you might infer that the Court has an opinion as to the facts proved, you will disregard, because it is wholly within your province to determine the effect of the testimony.

It is hereby certified that the instructions heretofore set out herein as having been given by the Court to the jury are all of the instructions given by the Court to the jury.

And within the time limited by the rule of the Court so to do, the defendant in writing requested the Court to give to the jury the following instruction:

The mere utterance or use of the words and statements set forth in the several counts of the indictment does not constitute an offense in any of said counts. Before a [288] defendant is guilty of violating the statute by oral statements, such statements must be made wilfully and with the specific intent made necessary by the statute, and such words and oral statements must be such that their necessary and legitimate consequence will produce the results forbidden by the statute.

Except as the same may be incorporated in the general charge, the Court refused to give said instruction to the jury and did not give the same, and to this refusal the defendant asked and was allowed an exception by the Court.

And within the same time the defendant requested in writing that the Court give the following instruction to the jury:

While it is a rule of law that every person is presumed to intend the necessary and legitimate consequences of what he knowingly does or says, the jury, however, has no right to find a criminal intent from words spoken unless such intent is the necessary and legitimate consequence

thereof. A jury has no more right to draw an inference from words that do not necessarily and legitimately authorize such inference than to find any other fact without evidence.

The Court refused to give this instruction to the jury and before the jury retired the defendant asked and was allowed an exception to the refusal.

And within the same time the defendant requested in writing that the Court give the following instruction to the jury:

If you find from the evidence that F. B. Tichenor, a deputy United States marshal, and L. E. Gaumaunt, a deputy sheriff of a county in the State of Washington, induced and incited, or lured the defendant on to make the statements charged in the indictment under the circumstances under which it has been testified such statements were made, and that said officers thereby procured the defendant to make said statements, you should find the defendant not guilty upon each of the Counts 1, 2, 3 and 4 of the indictment.

The Court refused to give this instruction to the jury, and before the jury retired the defendant asked and was allowed an exception to the refusal.

And within the same time the defendant requested in writing that the Court give the following instructions to [289] the jury:

If the defendant was intoxicated at the time of making any of the statements set forth in Counts 1, 2, 3 and 4 of the indictment, to such an extent that he could not deliberate upon or understand what he said, or have an intention to

say what he did, you should find the defendant not guilty upon each of said Counts 1, 2, 3 and 4 of the indictment.

While voluntary intoxication is no excuse or palliation for any crime actually committed, yet if upon the whole evidence in this case, by reason of defendant's intoxication (if you find he was intoxicated at the time), you have such reasonable doubt whether at the time of the utterance of the alleged language (if you find from the evidence defendant did utter said language) that defendant did not have sufficient mental capacity to appreciate and understand the meaning of said language and the use to which it was made; that there was an absence of purpose, motive or intent on his part to violate the Espionage Act at said time, then you cannot find him guilty upon Counts 1, 2, 3 and 4, although such inability and lack of intent was the result of intoxication.

The Court refused to give this instruction to the jury, and before the jury retired the defendant asked and was allowed an exception to the refusal.

And within the same time the defendant requested in writing that the Court give the following instruction to the jury:

If the jury finds that the defendant made the statements alleged in Counts 1, 2, 3 and 4 of the indictment, and that said statements were made as the result of sudden anger and without deliberation, you should find the defendant not guilty upon all of said Counts, 1, 2, 3 and 4.

The Court refused to give this instruction to the

jury, and before the jury retired the defendant asked and was allowed an exception to the refusal.

And within the same time defendant requested in writing that the Court give the following instruction to the jury:

Before you can find the defendant guilty under Count 3 of the indictment you must be satisfied from the evidence beyond a reasonable doubt, first, that the defendant made the statements or the substance thereof alleged and set forth in that count of the indictment; second, that he made said statements willfully and with the intention to incite, provoke or encourage resistance to the United States and to promote the cause of its [290] enemies; and, third, that said statements, if you find beyond a reasonable doubt that any were made, would naturally and legitimately incite, provoke or encourage resistance to the United States and to promote the cause of its enemies.

The Court refused to give this instruction to the jury and before the jury retired the defendant asked and was allowed an exception to the refusal.

And within the same time the defendant requested in writing that the Court give the following instruction to the jury:

Under the allegations of Count 3 of the indictment *it* the Government must prove to your satisfaction beyond a reasonable doubt, before you can find the defendant guilty, that the defendant willfully intended by the alleged statements both to incite, provoke and encourage re-

sistance to the United States and to promote the cause of its enemies, and it will not be sufficient for the Government to prove that the defendant willfully intended to bring about only one of such results.

The Court refused to give this instruction to the jury and before the jury retired the defendant asked and was allowed an exception to the refusal.

And within the same time the defendant requested in writing that the Court give the following instruction to the jury:

The words "support," "favor" and "oppose" import willfulness and intent, and it is alleged in the indictment that the statements set forth therein were made willfully. Therefore, before you could find the defendant guilty under Count 4 of the indictment, you must be satisfied from the evidence beyond a reasonable doubt, first, that the defendant made the statements as alleged in the indictment or in substance as alleged in the indictment; second, that the statements made by defendant, if you find beyond a reasonable doubt that he made any of the statements alleged, would naturally aid, defend and vindicate the cause of the Imperial German Government with which the United States was then and there at war, and would also naturally, necessarily and legitimately hinder and defeat or prevent the success of the cause of the United States in said war; and third, that said statements, if any, were made by the defendant willfully and knowingly with intent to support and

favor the cause of the Imperial German Government in said war, and oppose the cause of the United States therein.

The Court refused to give this instruction to the [291] jury and before the jury retired the defendant asked and was allowed an exception to the refusal.

And within the same time the defendant requested in writing that the Court give the following instructions to the jury:

Under the charge of Count 4 of said indictment the Government must satisfy you beyond a reasonable doubt that the defendant criminally intended both to support and favor the cause of the Imperial German Government and to oppose the cause of the United States in the war, and that the statements made, if any, would naturally produce both said results; otherwise you should acquit the defendant.

The Court refused to give this instruction to the jury and before the jury retired the defendant asked and was allowed an exception to the refusal.

And within the same time the defendant requested in writing that the Court give the following instruction to the jury:

E. C. Bendixen was produced by the Government as a witness to prove the charges set forth in Counts 1, 2, 3 and 4 of the indictment. You are instructed to disregard the testimony of said witness Bendixen for the reason that the testimony given by him does not tend to support the charges in said counts of the indictment.

The Court refused to give this instruction to the jury and before the jury retired the defendant asked and was allowed an exception to the refusal.

And within the same time the defendant in writing requested the Court to give to the jury the following instruction:

The statute upon which the indictment in the case is based is an enactment adopted by Congress for the purpose of aiding the Government's war activities and preventing interference therewith. The statute is operative only when the United States is at war; its operation and application begin when war begins, and when war ends the statute ceases to be operative. All of the provisions of the section of the statute upon which the indictments in the case are based have reference to war activities and war measures of the United States, or to the conduct intended to promote the success or cause of its enemies [292] in the war, so that utterances concerning the war which are not intended to and do not interfere with or affect in any way the war activities or war measures of the United States and do not promote the success or cause of its enemies do not violate the statute.

Except as the same may be incorporated in the general charge, the Court refused to give said instruction to the jury and did not give the same, and to this refusal the defendant asked and was allowed an exception by the Court.

And within the same time the defendant in writ-

ing requested the Court to give to the jury the following instruction:

“Promote,” as used in the charge of Count 3 of the indictment, means to help, to give aid, or assistance to the enemies of the United States in the waging of the war.

Except as the same may be incorporated in the general charge, the Court refused to give said instruction to the jury and did not give the same, and to this refusal the defendant asked and was allowed an exception by the Court.

And within the same time the defendant in writing requested the Court to give to the jury the following instruction:

“The cause of its enemies,” as used in Count 3 of the indictment, means any and all of the military measures taken or carried on by such enemies for the purpose of winning the war as against the United States.

Except as the same may be incorporated in the general charge, the Court refused to give said instruction to the jury and did not give the same, and to this refusal the defendant asked and was allowed an exception by the Court.

And within the same time the defendant in writing requested the Court to give to the jury the following instruction:

Counts 5, 6 and 7 of the indictment are based upon Section 3 of the Espionage Act as it existed prior to its amendment May 16, 1918. That section of the statute prior to its amend-

ment contained three clauses for which a criminal punishment was provided. [293]

Except as the same may be incorporated in the general charge, the Court refused to give said instruction to the jury and did not give the same, and to this refusal the defendant asked and was allowed an exception by the Court.

Before the jury retired the defendant was allowed by the Court an exception to the action of the Court in giving the following instruction to the jury:

It is proper that I should instruct you as to what is meant by resistance to the United States as used in this law and in this charge. The other words in the law and in the charge are plain and were used and have been used, in my opinion, in the ordinary, every-day, common-sense meaning.

Resistance as a proposition of law means to oppose by direct, active and *quasi*-forcible means the United States; that is, the laws of the United States and the measures taken under and in conformity with those laws to carry on and prosecute to a successful end the war in which the United States was then and is now engaged. Resistance means more than mere opposition or indifference to the United States or to its success in this war. *In* means more than inciting, provoking, or encouraging refusal of duty or obstructing or attempting to obstruct the United States. The element of direct, active opposition by *quasi*-forcible means is required to constitute the offense of resisting the

United States under this provision of the law and under this charge of the indictment. The offense, however, may be committed by wilfully and intentionally uttering language intended to promote the cause of the enemies of the United States without necessarily inciting, provoking, or encouraging forcible resistance to the United States. To promote means to help, to give aid, assistance to the enemies of the United States in the waging of this war. The cause of the enemies of the United States means any and all of their military measures taken or carried on for the purpose of winning the war as against the United States. The cause of the United States as used in this act does not mean the reason which induced the Congress of the United States to declare a state of war between the United States and the Imperial Government of Germany. It does not mean the aims of the war in the sense of the terms of peace to be imposed or the results to be accomplished or the time and conditions under which it is to be brought to a termination. In plain language, it means the side of the United States in the present impending and pending struggle. The words "oppose" and "cause" should be weighed and considered by you as limited to opposing or opposition to such military measures as are taken by the United States under lawful authority for the purpose of prosecuting that war to a successful and victorious determination. [294]

Now, because all the foregoing matters and things

are not of record in this case, I, CHARLES E. WOLVERTON, the Judge who tried the above-entitled cause in the above-entitled court, do hereby certify that the foregoing bill of exceptions correctly states all the proceedings had before me on the trial of said cause, and contains all of the testimony offered and introduced by the parties upon said trial, and contains all of the instructions of the Court to the jury and truly states the rulings of the Court upon the questions of law presented and the exceptions taken by the defendant appearing therein were duly taken and allowed; that said bill of exceptions was prepared and submitted within the time allowed by the order of the Court, and is now signed, sealed and settled as and for the bill of exceptions in said cause and the same is hereby ordered to be made a part of the record in said cause.

It is further ordered that all of the original exhibits introduced in evidence in the trial of this cause and now in the custody of the clerk of the Court be made a part of this bill of exceptions and filed herein.

IN WITNESS WHEREOF I have hereunto set my hand this 28th day of May, 1919.

CHAS. E. WOLVERTON,

United States District Judge.

State of Oregon,

County of Multnomah,—ss.

Due service of the within bill of exceptions is hereby accepted in Portland, Multnomah County, State of Oregon, this 14th day of May, 1919, by receiving a

copy thereof duly certified to as such by John McCourt, attorney for defendant.

BARNETT H. GOLDSTEIN,

Asst. United States Attorney for Oregon.

Filed May 28, 1919. G. H. Marsh, Clerk. [295]

AND AFTERWARDS, to wit, on the 18th day of June, 1919, there was duly filed in said court a praecipe for transcript of record, in words and figures as follows, to wit: [296]

In the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY ALBERS,

Defendant.

Praecipe for Transcript of Record.

To George H. Marsh, Clerk of the Above-entitled Court:

Please prepare a record and transcript for making the return of writ of error heretofore allowed in the above-entitled cause and include therein the following records and papers:

1. The indictment.
2. Journal entry of arraignment and plea.
3. Order permitting defendant to withdraw plea and allowing defendant to file a demurrer to the indictment.

4. Demurrer to the indictment.
5. Order overruling demurrer to the indictment.
(Note: Reference is had to the demurrer filed to all of the counts of the indictment. It is not necessary to include the special demurrer and orders thereon interposed to counts 5, 6 and 7 of the indictment.)
6. Journal entry upon entry of plea after hearing and ruling upon demurrer.
7. Journal entries relating to empanelling of jury and trial of cause.
8. Formal motion of defendant for directed verdict and Journal entry, if any, thereon.
9. Verdict. [297]
10. Motion in arrest of judgment.
11. Order overruling motion in arrest of judgment.
12. Sentence and judgment.
13. Order allowing writ of error, undertaking of defendant and other papers relating to writ of error.

Dated this 17th day of June, 1919.

(Signed) VEAZIE, McCOURT & VEAZIE,
Attorneys for Defendant.

Filed Jun. 18, 1919. G. H. Marsh, Clerk. [298]

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States, for the District of Oregon, pursuant to the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages numbered from 3 to 298, inclusive, constitute the transcript of record upon the said writ of error in accordance with the praecipe for transcript filed in said cause by the plaintiff in error in a cause in the District Court of the United States, for the District of Oregon, in which the United States of America is plaintiff and defendant in error, and Henry Albers is defendant and plaintiff in error; that the said transcript of record is a full, true, and complete transcript of the record of proceedings had in said court in said cause in accordance with the said praecipe for transcript, as the same appear of record and on file in my office and in my custody. I further certify that I return, with the said transcript attached, the writ of error issued in said cause to the District Court of the United States for the District of Oregon, and the original citation.

And I further certify that the cost of the foregoing transcript is \$93.00, and that the same has been paid by the said plaintiff in error.

In testimony whereof, I have hereunto set my hand

and caused the seal of said court to be affixed this 27th day of August, 1919.

[Seal]

G. H. MARSH,
Clerk. [299]

[Endorsed]: No. 3385. United States Circuit Court of Appeals for the Ninth Circuit. Henry Albers, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Oregon.

Filed August 30, 1919.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

Government's Exhibit "A."

Kent, Wash., Nov. 6, 1918.

My dear Mr. Heeney

I have been very much worried since I came back from Portland in regards to the Alber's case, I answered the questions asked me correctly but their was other things happened which I was not asked, and I been afraid that his attorney might ask of these happenings and I am not posted as to what I should do, You said you wanted Mr. Albers to have a fair trail and also the Gov. and that has also worried me, I will now tell you of some of things that happened. not that I want to try and save him, but save myself from any further trouble. After I heard him make

the remark about Mr. McAdoo I told him that he better keep his mouth shut and I told him I was an officer from the State of Washington, and he would get himself in trouble, now Mr. Heeney don't you think he must have been pretty drunk otherwise he would have shut his mouth, The jury asked me how drunk he was, and I think it was my place to have told them then but Mr. Tichneur told me to anser only what I was asked, now I am asking you to advise me, Mr. Bendixen was talking to him in the early part of the evening, and never made any remark to anyone in regard's to Albers, although he knows Tinchneur, I believe. So I went in the wash room and sat down and then the party began, it was late in the eve, when I went to look for the fellow who was who was with him who latter proved to be Bendixon. I don't know whether their is any personal feelings between ~~any of the~~ Bendixon or Albers, only Bendixon said he had an uncle in the firm, I also heard some people say when I was at the hotel that Tichneur said if Albers was not found guilty he would throw his star in the lake and jump in after it, but I did not let them people know who I was. These are the things I think you should know, now that I care for Albers in the least and if he found guilty it is due to you good judgment and I think your the man to know it all. If these things I said will in any way interfear with what I said, why let me know, as I don't want to make a mess out of this. You said tell the truth which I am doing but the jury did not ask me about this so I said nothing but since that time I have worried about these things and now

I feel much better. If at any time you should want to let me know about this why this is my address. If you don't remember me by name you will remember me by the white sweater as you called me.

L. E. GAMAUNT,
c/o Ford Agency,
Kent,
Wash.

Kindly advise me as to what I should in regards to this matter

[Endorsed]: U. S. District Court, District of Oregon. Filed February 5, 1919. G. H. Marsh, Clerk.

No. 3385. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 30, 1919. F. D. Monckton, Clerk.

Government's Exhibit "B."

3086-1—c

November 6, 1918.

Mr. L. E. Gamaunt,
C/o Ford Agency,
Kent, Wash.

Sir:

Attendance upon the court in trial has prevented an earlier reply to your letter of the 6th inst., which is hereby acknowledged.

I note what you say and in reply have only to say that the Government expects you to tell the truth, the whole truth, and nothing but the truth, when you are called as a witness; neither less nor more than

that will satisfy the Government or be fair to the defendant.

I cannot advise you as to when the case will be tried but imagine it will be shortly after January the 1st.

Respectfully,
UNITED STATES ATTORNEY.

[Endorsed]: U. S. District Court, District of Oregon. Filed Feb. 5, 1919. G. H. Marsh, Clerk.

No. 3385. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 30, 1919. F. D. Monckton, Clerk.

Defendant's Exhibit No. 1.

Statements of a German on 54 Oregonian about 8-45 P. M., 10-8-18, as follows:

Tey'l never lick the Kiser, not in a 1000 years

I am a German & dont deny it.

Once a Geman always a German.

Then spoke in German using words Rhine Sprekin offen & etc

Later when I entered he asked me if I played the game I answered that I played the oil game pretty strong.

He then asked me the same question & I answered only the oil game

He then said "You dont know what I mean you are a damm fool."

[Endorsed]: U. S. District Court, District of Oregon. Filed Feb. 5, 1919. G. H. Marsh, Clerk.

No. 3385. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 30, 1919. F. D. Monckton, Clerk.

Defendant's Exhibit No. 2.

Nov. 12-19-18

Mr. G. Albers.

This is something I don't like to do but I can't help it, ever since I got mixed up in your brother's case why I am losing most of my friends down here, I have been upholding him, in all respects whenever I was asked about him. My wife also is against me and says if he is saved why she will leave me, now if she wants to she is welcome to go tomorrow and the rest can go somewhere else, what I want to ask you is this will your brother look after me after the matter is finished, I have a good job here and am making big money, if he is saved why I loose everything which I cannot afford as I have nothing now only property which belongs to my wife I am willing to sacrifice it all to save him if he will take care of me after it is all finished which would be fine on his part You asked me about when the case was coming up I didn't think I should tell you but I see your interest is in the business, Mr. Heeney our attorney told me it would be either the 24th of this month or ten day's latter, our chances are very good I think, I told Mr. Heeney lots in my letter which the jury did not ask me, and I think he has another view point of the case. I am going to stay with it if they put me in jail, would like to see you but figure it better not too. Kindly burn this up as

is means alot to me at this time Kindly let me know your view of this matter, Mr. McGuir told me everything would be O. K. when I told him I would have to leave Kent, so I thought I would ask you I am a special Deputy here otherwise I would have been licked I guess.

Hoping everthing will be O. K,

I remain,

L. E. GAMAUNT.

Excuse pencil as I am in a hurry and going to Seattle on business and thought it would be a good chance to bring this to your house myself.

[Endorsed]: U. S. District Court, District of Oregon. Filed Feb. 5, 1919. G. H. Marsh, Clerk.

No. 3385. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 30, 1919. F. D. Monckton, Clerk.

Defendant's Exhibit No. 2a.

[Envelope]

MR. ALBERS.

[Endorsed]: U. S. District Court, District of Oregon. Filed Feb. 5, 1919. G. H. Marsh, Clerk.

No. 3385. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 30, 1919. F. D. Monckton, Clerk.

*In the District Court of the United States, for the
District of Oregon.*

UNITED STATES OF AMERICA

vs.

HENRY ALBERS,

Defendant.

Order Under Rule 16 Extending Time to and Including August 15, 1919, to File Record and Docket Case.

Now, on this day, this cause coming on to be heard upon the motion and application of the defendant for an extension of time for making and filing the transcript and record herein, and making and filing the return upon the writ of error heretofore allowed herein; and it appearing to the Court that the records and other papers constituting the transcript in the above-entitled cause are voluminous and that the same cannot be completed and filed within the time remaining therefor under the rules of the Court:

IT IS, THEREFORE, HEREBY ORDERED, that the time be, and the same hereby is, extended to and including the 15th day of August, 1919, within which the Clerk of this Court shall make return upon the writ of error heretofore allowed in the above-entitled cause and transmit the transcript to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California.

Done at Portland, Oregon, this 16th day of June, 1919.

CHAS. E. WOLVERTON,
District Judge.

[Endorsed]: No. ——. In the District Court of the United States for the District of Oregon. United States of America vs. Henry Albers, Defendant. Order Extending Time for Making and Filing Transcript and Record, and Filing Return Upon Writ of Error.

No. 3385. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to and Including Aug. 15, 1919, to File Record Thereof and to Docket Case. Filed Jun. 20, 1919. F. D. Monckton, Clerk.

In the District Court of the United States for the District of Oregon.

No. 8159.

August 5, 1919.

THE UNITED STATES OF AMERICA

vs.

HENRY ALBERS.

Order Under Rule 16 Extending Time to and Including August 31, 1919, to File Record and Docket Case.

Now, at this day, for good cause shown, it is ORDERED that the time for filing the transcript of record on writ of error in this cause and docketing

this cause in the United States Circuit Court of Appeals, for the Ninth Circuit, be and the same is hereby extended to August 31, 1919.

CHAS. E. WOLVERTON,

Judge.

[Endorsed]: No. 3385. United States Circuit Court of Appeals, for the Ninth Circuit. Order Under Rule 16 Enlarging Time to — to File Record Thereof and to Docket Case. Filed Aug. 14, 1919. F. D. Monckton, Clerk. Re-filed Aug. 30, 1919. F. D. Monckton, Clerk.